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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

AMERICAN NATIONAL BANK & TRUST COMPANY, - - - - - - - - - Petitioner

versus

H. C. HANSON,
VIRGINIA HANSON,
H. C. HANSON CONSTRUCTION COMPANY, INC., and
CONSTRUCTION ENGINEERS, INC., - Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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March 17, 1993

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QUESTIONS PRESENTED

1. Whether the trial court denied American National Bank & Trust Company ("American National") its rights to due process by permitting the jury to award punitive damages when it had refused to instruct the jury that it had directed verdicts for American National on the inflammatory issues of infliction of emotional distress, physical injuries, and fiduciary duty.

2. Whether the trial court denied American National its rights to due process by denying it a post-trial review in accordance with acceptable standards as set forth in *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S.___, 111 S.Ct. at 1032 (1991).

3. Whether the Kentucky Supreme Court denied American National its rights to due process by interpreting *Haslip* to require only a trial court review of punitive damage awards under the "first blush" test and appellate review of only errors of law made by the trial court.

4. Whether by reversing the decision of the Kentucky Court of Appeals, holding the award of punitive damages to be excessive, the Kentucky Supreme Court denied American National its rights to substantive due process.

PARTIES TO THE PROCEEDING

The Petitioner, American National Bank & Trust Company ("American National" or "Bank"), is a wholly-owned subsidiary of First Kentucky National Corporation ("FKNC"), which is a wholly-owned subsidiary of National City Corporation ("NCC").

The Respondents are H. C. Hanson Construction Company, Inc. ("Hanson Construction" or "Company"), Construction Engineers, Inc. ("Construction Engineers"), H. C. Hanson ("Hanson"), and Virginia Hanson (collectively "Hansons").

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv–vi
OPINIONS BELOW	1– 2
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2– 8
REASONS FOR GRANTING THE WRIT	8–27
I. The Kentucky Supreme Court Established Procedural Standards for the Imposition and Review of Punitive Damage Awards That Deny Procedural Due Process	8–20
A. The Jury Instructions Were Insufficient to Prevent the Jury From Considering Extraneous, Inflammatory, and Legally Insufficient Claims.	10–13
B. The Duties of a Kentucky Trial Court in the Review of Punitive Damage Awards, as Understood by Both the Trial Judge and the Kentucky Supreme Court, Are Inconsistent With Due Process.	13–16
C. There Is No Meaningful Appellate Review of Punitive Damage Awards in Kentucky as the Appellate Court Can Only Reverse if it Finds the Trial Court Abused its Discretion as to the Factual Existence of Passion or Prejudice by the Jury.	17–20
II. American National Was Denied its Fourteenth Amendment Right to Substantive Due Process.	21–27
A. Punitive Damages Must Bear a Relationship to the Injury.	23–25
B. Punitive Damages Must Not Destroy the Defendant.	25–27
CONCLUSION	28

TABLE OF AUTHORITIES

PAGE

Cases:

Adams v. *Murakam*, 54 Cal. 3d 105, 813 P.2d 1348, 284 Cal. Rptr. 318 (1991) 26

Alexander & Alexander, Inc. v. *B. Dixon Evander & Assoc., Inc.*, 596 A.2d 687 (Md. Ct. Spec. App. 1991), cert. denied, 605 A.2d 137 (Md. 1992) 10, 22–23

AMCA Int'l Fin. Co. v. *Hilgedick*, 499 U.S. __, 111 S.Ct. 1614 (1991) 10

Bank of Shaw v. *Posey*, 573 So.2d 1355 (Miss. 1990) 27

Bankers Life & Casualty Co. v. *Crenshaw*, 486 U.S. 71 (1988) 8, 13

Bisset v. *Goss*, 481 S.W.2d 71 (Ky. 1972) 25

Browning-Ferris Indus. of Vermont, Inc. v. *Kelco Disposal, Inc.*, 492 U.S. 257 (1989) 8, 13, 21

Church of Scientology of California v. *Wollersheim*, 499 U.S. __, 111 S.Ct. 1298 (1991) 10

Clayton Brokerage Co. of St. Louis, Inc. v. *Jordan*, 499 U.S. __, 111 S.Ct. 1298 (1991) 10

Connecticut v. *Doehr*, __ U.S. __, 111 S.Ct. 2105 (1991) 8

Daniels v. *Williams*, 474 U.S. 327 (1986) 18

Davis v. *Graviss*, 672 S.W.2d 928 (Ky. 1984) 16

Dent v. *West Virginia*, 129 U.S. 114 (1889) 18

Fleming Landfill, Inc. v. *Garnes*, 499 U.S. __, 111 S.Ct. 2882 (1991) 10

Fuentes v. *Shevin*, 407 U.S. 67 (1972) 8

Garnes v. *Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991) 9, 28

Gertz v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) 8, 22

Hammond v. *City of Gadsden*, 493 So.2d 1374 (Ala. 1986) 14

Hensley v. *Paul Miller Ford, Inc.*, 508 S.W.2d 759 (Ky. 1974) 26–27

Herman v. *Sunshine Chem. Specialties, Inc.*, 608 A.2d 978 (N.J. Super. Ct. App. Div. 1992), *cert. granted*, 614 A.2d 620 (N.J. 1992) 10, 26

PAGE

Hodges v. *S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992) 10
Hospital Authority of Gwinnett County v. *Jones*, 499 U.S. __, 111 S.Ct. 1298 (1991) 10
Intercontinental Life Ins. Co. v. *Lindblom*, 499 U.S. __, 111 S.Ct. 1575 (1991) 10
International Society for Krishna Consciousness of California v. *George*, 499 U.S. __, 111 S.Ct. 1299 (1991) 10
Louisville & N.R. Co. v. *Roth*, 114 S.W. 264 (Ky. 1908) 24
Lynch v. *Household Fin. Corp.*, 405 U.S. 538 (1972) 8
Missouri Highway & Transp. Comm'n v. *Wallach*, 826 S.W.2d 901 (Mo. Ct. App. 1992) 13
Nicholson v. *United Pacific Ins. Co.*, 710 P.2d 1342 (Mont. 1985) 22
North Georgia Finishing, Inc. v. *Di-Chem, Inc.*, 419 U.S. 601 (1975) 8
Pacific Lighting Corp. v. *MGW, Inc.*, 499 U.S. __, 111 S.Ct. 1299 (1991) 10
Pacific Mut. Life Ins. Co. v. *Haslip*, 499 U.S. __, 111 S.Ct. 1032 (1991) ..... *passim*
Park County v. *Roepack, Inc.*, 526 N.E.2d 732 (Ind. Ct. App. 1988) 13
Portec, Inc. v. *The Post Office*, 499 U.S. __, 111 S.Ct. 1299 (1991) 10
Prater v. *Arnett*, 648 S.W.2d 82 (Ky. Ct. App. 1983) 18
Reserve Life Ins. Co. v. *Eichenseer*, 499 U.S. __, 111 S.Ct. 1298 (1991) 10
Riddle v. *Dean Mach. Co.*, 564 S.W.2d 238 (Mo. Ct. App. 1978) 19
Seaman's Direct Buying Service, Inc. v. *Standard Oil Co.*, 686 P.2d 1158 (Cal. 1984) 22
Sniadach v. *Family Fin. Corp.*, 395 U.S. 337 (1969) 8
Story v. *City of Bozeman*, 791 P.2d 767 (Mont. 1990) 22

PAGE

Transamerica Occidental Life Ins. Co. v. *Koire*, 499 U.S. __, 111 S.Ct. 2253 (1991) 10
Vasbinder v. *Scott*, 976 F.2d 118 (2nd Cir. 1992) 25
Young v. *Environmental Air Prod., Inc.*, 665 P.2d 88 (Ariz. 1982) 13

Statutes:
28 U.S.C.A. § 1257(a) (West. Supp. 1992) 2
42 U.S.C.A. § 1983 (West 1981) 26
Ky. Rev. Stat. Ann. § 411.184 (Michie 1992) 21, 27
Ky. Rev. Stat. Ann. § 411.186 (Michie 1992) 11, 21, 27
Ky. Rev. Stat. Ann. § 427.060 (Michie 1992) 20

Other Authorities:
Sup. Ct. R. 10.1(b) 10
25 C.J.S. *Damages* § 117(1) (1966) 25

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v.

H. C. HANSON,
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H. C. HANSON CONSTRUCTION COMPANY, INC., and
CONSTRUCTION ENGINEERS, INC., - - - *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

Petitioner hereby petitions for a Writ of Certiorari to review the decision of the Supreme Court of Kentucky in this case.

OPINIONS BELOW

The decision of the Supreme Court of Kentucky (Appendix, *infra*, pp. 1a-16a) is reported at 844 S.W.2d 408 (Ky. 1992). That decision affirmed in part and reversed in part a decision of the Court of Appeals of Kentucky that was not reported. It is reprinted in Appendix, *infra*, pp 17a-34a. The decision of the Court of Appeals of Kentucky affirmed in part and reversed in part an amended judgment of Warren Circuit Court, entered March 7, 1989, pursuant to a jury verdict rendered on January 25, 1989. The

amended judgment of Warren Circuit Court (Appendix, *infra*, pp. 35a-40a) denied the Petitioner's motions for new trial, judgment notwithstanding the verdict and/or remittitur.

JURISDICTION

The decision of the Supreme Court of Kentucky was rendered December 17, 1992. No petition for re-hearing was sought. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C.A.§1257(a) (West Supp. 1992).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

This Petition presents for review the first case from the Kentucky Supreme Court which affirmed an extremely large award of punitive damages based on its interpretation of the review standards approved in *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. __, 111 S.Ct. 1032 (1991).

The jury awarded the Hansons $1,065,000.00 in compensatory damages and $5,775,000.00 in punitive damages. The Kentucky Court of Appeals affirmed the compensatory damages but reversed the punitive damages as excessive. The Supreme Court of Kentucky reversed that part of the decision of the Kentucky Court of Appeals respecting punitive damages and reinstated the jury's award of punitive damages in its entirety. By so doing, it failed to apply, or

misinterpreted, the due process standards approved in *Haslip*.

Hanson, a degreed engineer, formed Hanson Construction and Construction Engineers to engage in highway bridge construction. During the mid-1970's, Hanson Construction became a customer of American National. From 1982 through 1985, Hanson Construction lost [$403,359.00]. As the losses increased, stockholder equity dropped and the Company's debt to American National rose. Hanson admitted that the Company kept operating only through monies borrowed from American National. By 1985, American National's loans to Hanson Construction were classified.[1]

In February 1985, American National was purchased by FKNC. Employees of First National Bank of Louisville, another subsidiary of FKNC, were assigned to American National to assist in its operations. In June 1985, one of those employees, Tom Gurbach, a management trainee, was asked to review Hanson loans.

Hanson Construction had seven (7) outstanding notes with American National, including a line of credit (total debt of $632,848.00). Hanson was personally obligated on the entire debt. His wife, Virginia Hanson, was personally obligated on up to $300,000.00 of Company debt.

As a part of his review of Hanson Construction, Gurbach prepared a Memorandum dated July 8, 1985. That Memo-

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[1] Classified loans are loans that are "characterized by the distinct possibility that the Bank will sustain some loss if the deficiencies are not corrected." (Joint Statement of the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, and the Conference of State Bank Supervisors on "The Classification of Assets in Bank Examination," June 1979.)

randum detailed the Company's financial history as well as its debt structure with the Bank and suggested a consolidation of all debt with a line of credit to keep Hanson "in business". To prevent the use of money from the line of credit to make payments on term debt (much like using a credit card to pay a car payment), Gurbach suggested that withdrawals be restricted based upon construction progress. Additionally, Gurbach stated that when cash flow was poor during the winter months, Hanson would have to fund operations from his own assets.

On July 12, 1985, Hanson met with Bank officers to discuss the restructure of the Company debt. In that meeting, the head of American National's Corporate Service Department, Willie McElroy, insisted that if the Bank was to re-write the debt, Hanson would have to secure it with a second mortgage on his home. Although purchased with marital funds, the home was titled in only Virginia Hanson's name.

On July 15, 1985, Hanson wrote the Bank a letter that set out his "proposal for the loan committee's consideration." It proposed a $125,000.00 operational line of credit "for the continued operation of the Company" to be secured only by receivables. It mentioned no other financing for future operations.

However, according to Hanson, he later contacted David Chesnut, Executive Vice President of the Bank and his former loan officer. Hanson said that Chesnut told him that if he granted a second mortgage to secure Company debt, the Bank would restructure the debt on a three (3) year balloon note, renewable for up to fifteen (15) years, and that the Bank would finance all of his future contracts for up to fifteen (15) years in an amount equal to twenty

percent (20%) of the contract at the Bank's then prevailing interest rate.

A closing of the restructured debt occurred on July 26, 1985. McElroy was on vacation and not present. The restructured debt was closed by another Corporate Service Officer and the Bank's counsel. The closing documents consisted of the restructure note, which consolidated six of the outstanding notes of Hanson Construction (the $125,000 line of credit was left open), a seven page loan agreement that summarized the entire transaction, and various mortgages and security agreements.[2] The closing lasted approximately an hour and forty-five minutes.

Hanson admitted that he signed the documents even though he did not read them. According to Hanson, the closing attorney objected to him reading the documents, saying it would take all day. Hanson said the loan documents he signed did not reflect Chestnut's alleged promises and that the Bank dissuaded him from reading the documents as part of a fraudulent scheme to obtain additional collateral (the "Fraudulent Inducement Claim").

In January 1987, Hanson approached McElroy for additional funding on a new contract that he was negotiating. He also requested an interest reduction on his debt to the Bank. Hanson's requests were reviewed by the Executive Loan Committee. The Committee noted that the cash

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[2] Significant differences existed between the Gurbach Memorandum and the restructure actually effected. Hanson Construction was granted operating funds during the winter. The restructure note of July 26, 1985 did not require debt service during the winter months. The $125,000.00 operating line of credit was not restricted.

flow from operations was insufficient to service debt[3], that the Company was unable to obtain bonding, was highly leveraged, and its equipment was aging. On February 5, 1987, the Committee denied Hanson's requests and prohibited future draws on the existing lines of credit, except that the Bank permitted three weeks of additional draws for the Company to meet payrolls while it sought financing elsewhere.

On March 11, 1987, American National called two demand notes, representing the Company's operational line of credit and another line established in 1986 for a specific contract. The restructure note was not called. The Company defaulted on the March payment. The Hansons sued the Bank on April 13, 1987.

In its amended pleadings, the Bank raised the defense that the imposition of punitive damages in this matter would violate its constitutional rights to due process.

At trial, Hanson introduced proof to recover under the following theories in addition to the Fraudulent Inducement Claim: breach of the duty of good faith, breach of oral contract, breach of fiduciary duty, intentional infliction of extreme emotional distress, and physical injury. At the close of the Hansons' proof, and again at the close of all of the proof, the Bank moved for directed verdicts. The court dismissed the Hanson claims based upon breach of oral contract, breach of fiduciary duty, intentional infliction of extreme emotional distress, and physical injury. The Bank

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[3] The Company's 1986 audit showed a paper profit of $3,515.00. Hanson's auditor admitted that a payment to an affiliated company, on Hanson's books as a loan rather than a payment, and the double-booking of inventory, accounted for an approximate $100,000.00 "swing" in the last month of the year.

requested that the court instruct the jury of its decisions, arguing that the jury had heard the proof related to those claims and that such an instruction was necessary for the jury to be properly instructed. The court refused.

On January 25, 1989, the jury returned its verdict against American National on the Fraudulent Inducement Claim. The Hansons were awarded compensatory damages in the sum of $1,065,000.00 and punitive damages in the sum of $5,775,000.00. A judgment was entered on January 27, 1989.

On February 6, 1989, American National filed a motion for a new trial, for judgment notwithstanding the verdict, and/or remittitur. In those motions, it again raised the constitutional issue of due process. At a hearing on those motions, the trial court stated, in effect, that it had *no discretion* to review the amount of punitive damages.

American National appealed the trial court's amended judgment to the Kentucky Court of Appeals. American National again raised the constitutionality of the imposition of punitive damages before that court. Recognizing the review standards approved in *Haslip*, the Kentucky Court of Appeals attempted to reconcile those standards with existing Kentucky law. The Court of Appeals affirmed the finding of fraud. However, it determined that punitive damages were excessive and reversed that portion of the amended judgment and remanded for either a new trial and/or remittitur.

Both parties sought and were granted discretionary review before the Supreme Court of Kentucky. American National again raised the constitutionality of the imposition of punitive damages under the facts of the case. After finding that the instructions given to the jury met the

Haslip standards, the Kentucky Supreme Court simply noted that post-trial review also "conformed to the test." It then reiterated the existing law in Kentucky which is based upon excessiveness, denominated the "first blush" rule. Thus, the Kentucky Supreme Court noted the *Haslip* standards, but failed to apply them. It erroneously held that the most cursory post-trial review, the "first blush" rule, is the equivalent of the standards approved by this Court in *Haslip*.

REASONS FOR GRANTING THE WRIT

I. THE KENTUCKY SUPREME COURT ESTABLISHED PROCEDURAL STANDARDS FOR THE IMPOSITION AND REVIEW OF PUNITIVE DAMAGE AWARDS THAT DENY PROCEDURAL DUE PROCESS.

It is beyond question that rights guaranteed by the Fourteenth Amendment to the Constitution of the United States apply to proceedings in civil actions tried in state courts. *Sniadach* v. *Family Fin. Corp*, 395 U.S. 337 (1969); *Fuentes* v. *Shevin*, 407 U.S. 67, (1972); *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975); *Connecticut* v. *Doehr*, __ U.S. __, 111 S.Ct. 2105 (1991). Property rights have been considered by this Court to be basic civil rights. *Lynch* v. *Household Fin. Corp.*, 405 U.S. 538, (1972). The application of federal constitutional standards in determining the appropriateness of punitive damages has received much attention in recent decisions of this Court. See *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974); *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71 (1988); and *Browning-Ferris Indus. of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257 (1989).

In *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. __, 111 S.Ct. 1032 (1991), this Court discussed at length the pa-

rameters of punitive damages within the confines of the due process clause of the United States Constitution. While this Court upheld the imposition of punitive damages in that case, it stated that ". . . general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus." *Haslip*, 111 S.Ct. at 1043. This Court then discussed constitutionally acceptable standards in three phases of the litigation process: instructions to the jury, post-trial review by the trial judge, and appellate review. American National has been denied constitutionally acceptable standards in all three phases and, thus, its constitutional rights to due process under the Fourteenth Amendment.

The appellate courts of other states have recognized *Haslip* as constitutional direction regarding their award of punitive damages. The Supreme Court of Appeals of West Virginia in *Garnes* v. *Fleming Landfill, Inc.*, 413 S.E.2d 897 (W.Va. 1991), acknowledged that *Haslip* mandated a restructure of that state's appellate review process with respect to punitive damage awards. It noted:

> We believe that the U.S. Supreme Court's adoption of punitive damages standards is a major step in the unification of America's decisional law in matters where the separate states are unable to craft a set of rational rules. State courts have adopted standards that are, for the most part, not predictable, not consistent, and not uniform. Such fuzzy standards inevitably are most likely to be applied arbitrarily against out-of-state defendants.[4]

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[4] While American National was located in Bowling Green, Kentucky, Hanson's counsel, in closing, asked the jury, in awarding punitive damages, to send a message to Louisville and Cleveland (the cities where the Bank's holding companies are located); he sought exactly the type of arbitrary action the West Virginia court suggested fuzzy standards fostered.

Id. at 905 (citations omitted). Other states applying the *Haslip* standards include Maryland, New Jersey, and Tennessee.[5] *See* Sup. Ct. R. 10.1(b).

Moreover, since this Court's decision in *Haslip*, it has granted review of a number of cases from either the highest court of the respective state, or the United States Circuit Court of Appeals, applying state law in cases in which punitive damages were imposed. This Court has, consistent with *Haslip*, granted review and reversed in at least eleven cases.[6]

A. The Jury Instructions Were Insufficient To Prevent The Jury From Considering Extraneous, Inflammatory, And Legally Insufficient Claims.

In discussing the instructions in *Haslip*, this Court noted that those instructions accommodated Pacific Mutual's interest in rational decision making and the state's interest

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[5] A partial list includes: *Alexander & Alexander, Inc.* v. *B. Dixon Evander & Assoc., Inc.*, 596 A.2d 687 (Md. Ct. Spec. App. 1991), *cert. denied*, 605 A.2d 137 (Md. 1992); *Herman* v. *Sunshine Chem. Specialties, Inc.*, 608 A.2d 978 (N.J. Super. Ct. App. Div.), *cert. granted*, 614 A.2d 620 (N.J. 1992); *Hodges* v. *S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992).

[6] *Fleming Landfill, Inc.* v. *Garnes*, 499 U.S. __, 111 S.Ct. 2882 (1991); *Portec, Inc.* v. *The Post Office*, 499 U.S. __, 111 S.Ct. 1299 (1991); *Pacific Lighting Corp.* v. *MGW, Inc.*, 499 U.S. __, 111 S.Ct. 1299 (1991); *International Society for Krishna Consciousness of California* v. *George*, 499 U.S. __, 111 S. Ct. 1299 (1991); *Church of Scientology of California* v. *Wollersheim*, 499 U.S. __, 111 S.Ct. 1298 (1991); *Hospital Authority of Gwinnett County* v. *Jones*, 499 U.S. __, 111 S. Ct. 1298 (1991); *Reserve Life Ins. Co.* v. *Eichenseer*, 499 U.S. __, 111 S.Ct. 1298 (1991); *Clayton Brokerage Co. of St. Louis, Inc.* v. *Jordan*, 499 U.S. __, 111 S.Ct. 1298 (1991); *Intercontinental Life Ins. Co.* v. *Lindblom*, 499 U.S. __, 111 S.Ct. 1575 (1991); *AMCA Int'l Fin. Co.* v. *Hilgedick*, 499 U.S. __, 111 S.Ct. 1614 (1991); *Transamerica Occidental Life Ins. Co.* v. *Koire*, 499 U.S. __, 111 S.Ct. 2253 (1991).

in the assessment of appropriate deterrence and retribution. Thus, both the defendant and the state had an interest to be protected. Neither of those interests were met in this case through the instructions given to the jury.

American National was denied its right to a trial by jury properly instructed. The Bank did not object at trial and does not raise here the question of whether the punitive damage instruction actually given to the jury was correct. That instruction was a correct and accurate representation of Kentucky's punitive damage statute, KY. REV. STAT. ANN. §411.186 (Michie 1992). However, the test should not end there. The jury instructions *in toto* did not meet American National's constitutional right to due process, because the jury was not instructed that the court had directed verdicts on a number of the theories and issues, the theories most likely to incite passion and prejudice on the part of the jury and about which they had heard evidence.

Hanson testified that after the Bank denied his Company credit, he considered suicide as an option. His alleged thought process was that insurance proceeds would satisfy the debt and save his good name. The trial court held, as a matter of law, that Hanson failed to prove intentional infliction of extreme emotional distress. However, the court refused to instruct the jury of that decision or to otherwise limit the effect of that testimony.

Hanson was permitted to testify that because the Bank called his loans he became a common laborer for his son's company. In that capacity, he was forced to move a heavy battery. As a consequence, he suffered a back injury. While the trial court ruled that injury had an insufficient nexus with the actions of the Bank, it refused to advise the jury of its decision or to admonish them to not consider testimony about physical injury and pain.

Additionally, Hanson testified that he had over the years developed a relationship of trust with the Bank. The context of that testimony was not to establish reliance for the purpose of fraud but rather to prove that the Bank was the fiduciary of Hanson. The trial court rejected Hanson's argument that the Bank was his fiduciary but also refused to instruct the jury of that decision.

During the trial, Hanson offered significant testimony regarding the alleged oral contract he had made with the Bank. He testified that the Bank had committed to renew his July 26, 1985 note for up to fifteen (15) years. Moreover, he testified that the Bank had committed to fund all future contracts he obtained—without regard to legal lending limits or other federal constraints—in an amount up to twenty percent (20%) of the contract at the Bank's then prevailing interest rate. The Bank was granted a directed verdict on that theory. The Bank sought to have the jury instructed as to that matter, but the trial court refused.

The jury was not properly instructed because it was not instructed as to the directed verdicts on the claims through which irrelevant and inflammatory evidence was introduced. The Petitioner recognizes that Kentucky has long followed the "bare bones" test for instructions. But in a case where the plaintiff demands not just compensatory damages relating to specific instructions, but additionally demands a much larger sum of punitive damages, a state's long recognition of a particular form of instructions does not, necessarily, meet the standards of constitutional protection. The jury should have been instructed to disregard the irrelevant and inflammatory evidence in its deliberation on the award of punitive damages.

Other states have recognized that a jury cannot be properly instructed unless it is told what has been removed from its consideration. In *Missouri Highway & Transp. Comm'n* v. *Wallach*, 826 S.W.2d 901 (Mo. Ct. App. 1992), the Missouri Court of Appeals stated: "A withdrawal instruction is appropriate where the jury might infer from the evidence presented that inappropriate factors relating to damages were included." *Id.* at 903.

Arizona and Indiana have recognized the same right. *Young* v. *Environmental Air Prod., Inc.*, 665 P. 2d 88 (Ariz. 1982); *Park County* v. *Roepack, Inc.*, 526 N.E.2d 732 (Ind. Ct. App. 1988). But the Hanson jury, which heard testimony about a contemplated suicide and physical injury, and which imposed an award of punitive damages in excess of five times the compensatory award, was not so instructed. By failing to so instruct the jury, the trial court denied American National its right to due process.

B. The Duties Of A Kentucky Trial Court In The Review Of Punitive Damage Awards, As Understood By Both The Trial Judge And The Kentucky Supreme Court, Are Inconsistent With Due Process.

In *Haslip*, this Court severely questioned the review of punitive damage awards by state courts under the meager and imprecise test of whether the award "evinces passion, bias and prejudice." *Haslip*, 111 S.Ct. at 1045 n.10. The Court noted that it had "expressed concern" in *Browning-Ferris*, 492 U.S. 257 and *Bankers Life*, 486 U.S. 71, about this type of limited trial court review. Yet, that is precisely the standard applied in this case.

In contrast, the *Haslip* Court cited with approval Alabama's much more comprehensive post-trial review.

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Among the factors on which this Court focused was the presence of a "meaningful and adequate review *by the trial court* whenever a jury has fixed the punitive damages." *Haslip*, 111 S.Ct. at 1044 (emphasis added). This Court noted that an Alabama trial judge will "reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of the damages." *Id.* (quoting *Hammond* v. *City of Gadsden*, 493 So.2d 1374, 1379 (Ala. 1986)). Furthermore, the Alabama trial court was expected to consider the following:

1. the culpability of the defendant's conduct;
2. desirability of discouraging others from similar conduct;
3. impact upon the parties; and
4. other factors such as the impact on innocent third parties.

The inaction of the Kentucky trial court and the decision of the Kentucky Supreme Court flout this Court's emphasis and direction with respect to trial court review.

Specifically, while recognizing some problems with the punitive damages award, the trial court provided the following explanation as to why it could not act to protect American National:

> Usually a judgment of this nature causes all of us to pause and think about not only the case, but throughout this system as a whole and how it should function, whether it functions properly. The function of a trial judge is a little different from the function of an appellate judge. I can't—there are times when I have to decide issues that have not been decided before, and to do that, I try to look at decisions from other jurisdictions to see if they're logical, and if they make sense, and then I just have to rely on my own experience and training and instincts to make decisions.

> In other instances, there are decisions of the Supreme Court and the Court of Appeals which are binding upon me, and when there are, I must follow those decisions. I don't really have any choice. . . . I'm concerned, and I've expressed this concern during the trial, that punitive damages have a very important function in our law, and I think they serve a useful purpose. I'm concerned that in some instances, the punitive damages may have gotten out of hand to the point where they don't serve the function of merely punishing, but they serve the function of destroying.
>
> However, our Supreme Court has taken the view, as I've indicated, even as recently as this year or late last year, that it would not disturb a—and the Court of Appeals took a similar view—that it would not disturb a verdict out of this court involving punitive damages over 42 times the compensatory damages; so they apparently do not consider that in arriving at a decision.[7]

Thus, the trial court exercised no discretion, because it believed it had none. This standard of review applied to American National is plainly insufficient under *Haslip* where this Court stated that state court procedures must impose "a sufficiently definite and meaningful constraint on the discretion of . . . fact finders in awarding punitive damages." *Haslip*, 111 S.Ct. at 1045.

Unfortunately, the Kentucky Supreme Court's opinion on the power of a trial court to interfere with a punitive

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[7] This statement was made, on the record, by the trial judge at a hearing on the Bank's motion for new trial, judgment notwithstanding the verdict, and/or remittitur. In that motion, the Bank argued *inter alia*, that the punitive damages award was excessive, that the jury was inflamed by the evidence related to theories on which directed verdicts had been granted but no withdrawal instructions given, and that the imposition of the damages violated its constitutional rights. The Kentucky Court of Appeals recognized in its decision the trial court's focus on the 42 multiple of compensatory damages. (App., p. 31a).

damages award is equally deficient. Citing *Davis* v. *Graviss*, 672 S.W.2d 928 (Ky. 1984), the Kentucky Supreme Court stated that it was sufficient for a trial court to apply what is known in Kentucky as the "first blush" rule.

In *Davis* v. *Graviss*, the "first blush" rule was explained as follows:

> The 'first blush' rule is a mechanism to assist the *trial court* in performing its responsibility when called upon to decide whether the award is so excessive as to appear 'to have been given under the influence of passion or prejudice.' C.R. 59.01(d). In its entirety it is that 'a verdict may be set aside as excessive only if 'it is (so) to such an extent as to cause the mind at first blush to conclude that it was returned under the influence of passion or prejudice on the part of the jury.'

Id. at 932 (court's emphasis).

Interestingly, the *Davis* case did not even involve a punitive damage award. There, the plaintiff sustained substantial physical injuries in an automobile accident and was awarded solely compensatory damages in the amount of $309,000.00.[8]

Whatever the merits of a "first blush" test may be for reviewing compensatory damages for personal injury claims, the *Haslip* Court's contrasting of the Alabama procedure with that of Vermont and Mississippi indicates that it is wholly inappropriate in the context of a punitive damages award. *Haslip*, 111 S.Ct. at 1045 n.10.

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[8] Ms. Davis' injuries included a broken nose, dislodged teeth, dizziness, a concussion, and a basilar skull fracture which caused a leakage of spinal fluid creating a danger for future meningitis, brain abscesses and other neurological problems. *Davis*, 672 S.W.2d at 929.

C. There Is No Meaningful Appellate Review Of Punitive Damage Awards In Kentucky As The Appellate Court Can Only Reverse If It Finds The Trial Court Abused Its Discretion As To The Factual Existence Of Passion Or Prejudice By The Jury.

The Kentucky Supreme Court compounded its error with respect to the trial court's review authority by establishing that the proper standard for appellate review is whether the trial court abused its discretion in making the factual determination of bias and prejudice on the part of the jury. This standard stands in stark contrast to that approved in *Haslip*.

In *Haslip*, this Court noted that Pacific Mutual had "received the benefit of *appropriate* review by the Supreme Court of Alabama." *Id.* at 1046. (emphasis added). This Court approved the following criteria for use by appellate courts in the review of punitive damage awards:

a) whether there is a reasonable relationship between the punitive damage award and the harm likely to result from the defendant's conduct as well as the actual harm;

b) the degree of reprehensibility of the defendant's conduct, its duration, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct;

c) the profitability of the wrongful conduct;

d) the financial position of the defendant;

e) the cost of litigation;

f) the imposition of criminal sanctions; and

g) the existence of other civil awards.

Id. at 1045.

Use of these criteria permitted a determination of "whether a punitive award is reasonably related to the goals of deterrence and retribution." *Id.* The *Haslip* deci-

sion further noted that Alabama had actually applied these criteria to reduce punitive damage awards.

In contrast to the strict *de novo* review used by Alabama appellate courts, the rule established for Kentucky is only whether the trial court abused its discretion in applying the "first blush" test. In *Davis* (the authority relied upon by the Kentucky Supreme Court in this case), the court noted that "the appellate function [for reviewing jury damage awards] is properly described in *Prater* v. *Arnett* . . .", *Davis*, 672 S.W.2d at 932. The court then went on to quote the following passage in *Prater*:

> Upon reviewing the action of a trial judge in (granting or denying a new trial for excessiveness), the appellate court no longer steps into the shoes of the trial court to inspect the actions of the jury from his perspective. Now, the appellate court reviews only the actions of the trial judge . . . to determine if his actions constituted an error of law. There is no error of law unless the trial judge is said to have abused his discretion and thereby rendered his decision clearly erroneous. Further, the action of the trial judge is presumptively correct . . . .

Id. (*quoting Prater* v. *Arnett*, 648 S.W.2d 82, 86 (Ky.Ct.App. 1983)).

Haslip's focus on careful application of punishment through punitive damages reflects fundamental aspects of due process. Even wrongdoers are granted "protection of the individual against arbitrary action of the government." *Daniels* v. *Williams*, 474 U.S. 327, 331 (1986) (quoting *Dent* v. *West Virginia*, 129 U.S. 114 (1889)). Yet there is no possibility of determining what is or is not "arbitrary" unless state appellate courts examine the appropriateness of the punitive award by using more than the platitude of "first blush."

While paying lip service to this Court's opinion in *Haslip*, the Supreme Court of Kentucky reiterated and restated that "gentle rule" of excessiveness:

> It is with equal caution that this Court does not substitute its opinion as to the amount of exemplary damages for that of the jury. It was the trial jury and trial judge who heard all the evidence and had the opportunity to see and hear the witnesses during the lengthy trial. The sanctity of the jury verdict is at the heart of our judicial system.

(App., p. 14a). Thus, the Kentucky Supreme Court denied American National its constitutional right to meaningful review.

Had the Supreme Court of Kentucky applied even some of the standards approved in *Haslip*, it would have had to consider:

a) *The Bank Could Not Have Reasonably Anticipated Damaging The Hansons By Over A Million Dollars.* The Court would have had to consider whether or not a bank could have forseen such losses when Hanson Construction had experienced years of operating losses, had a negative net worth of [$168,224.00] as of the date of the cut-off of credit, and was in the highly speculative heavy construction industry.[9]

b) *The Likely Gain To The Bank Was Minimal.* The Court would have had to consider the gain the Bank was receiving by fraudulently inducing the Hansons to provide additional collateral when the Bank, in any event, could have obtained a judgment lien on the Hansons' property in excess of

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[9] Missouri has denied the award of lost profits in the heavy construction industry, holding, as a matter of law, such damages to be highly speculative. *Riddle* v. *Dean Mach. Co.*, 564 S.W.2d 238 (Mo. Ct. App. 1978).

the equity of the Hansons' in that collateral (subject only to the minimal Kentucky exemptions).[10]

The Kentucky Court of Appeals recognized the need for a more detailed review of a punitive damage award. The Court of Appeals considered that punitive damages "should be measured by the injury inflicted and its cause" and that "the injury inflicted and its cause" should be taken into account. The Court of Appeals also considered whether the injury inflicted was "substantial" and whether the actor tried "to remedy its misconduct". The absence of a serious danger of physical injury and the deterrent effect of the $1.065 million dollar compensatory award were also mentioned. After considering all of these factors, the Court of Appeals decided that punitive damages of more than three times compensatory damages was excessive in this case. (App., pp. 32a-33a).

The substitution by the Kentucky Supreme Court of a "first blush" test for the Court of Appeals' efforts to provide a serious analysis consistent with due process was reversible error.[11]

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[10] The Hansons argued that the Bank's fraud was designed to obtain a second mortgage on the home titled in Virginia Hanson's name. However, prior to the restructure, she was already personally obligated for $300,000.00 of Company debt, a sum in excess of her net equity in the home. Thus, obtaining a second mortgage permitted the Bank to benefit only to the minimal extent of eliminating Kentucky's $5,000.00 homestead exemption. KY. REV. STAT. ANN. §427.060.

[11] It is American National's position that the review standards applied by the Kentucky Court of Appeals, although similar to the standards approved in *Haslip*, fell far short of the standards required to provide due process. The authority for the "first blush" rule is cited, the trial court's responsibility to conduct a thorough review is not clearly stated, and the need for *de novo* appellate review is not established.

II. AMERICAN NATIONAL WAS DENIED ITS FOURTEENTH AMENDMENT RIGHT TO SUBSTANTIVE DUE PROCESS.

In *Browning-Ferris*, 492 U.S. 257, this Court noted that authority existed to place an outer limit on damages awarded pursuant to a statutory scheme (presumably such as the punitive damage statute codified at KY. REV. STAT. ANN. §§411.184 and 411.186) but that it had never addressed the precise question as to whether substantive due process acted as a check on undue jury discretion in awarding punitive damages. This Court suggested that that inquiry awaited another day.

Then in *Haslip*, before this Court began its analysis of procedural due process, it suggested that unlimited discretion in fixing punitive damages could jar "constitutional sensibility" *Haslip*, 111 S.Ct. at p. 1043. In a case such as this, where the only injury is financial, and in which compensatory damages are clearly adequate, the award of punitive damages in excess of five times the compensatory damages, and in an amount equal to one-half of the net worth of the defendant, jars those sensibilities.

The Kentucky Court of Appeals, without stating its concerns in constitutional terms, recognized the problem. The court noted that the only damages to Hanson were financial and that the award of compensatory damages was adequate. It referenced the various statutory schemes under which damages are multiplied. Having engaged in that analysis, it determined that the punitive damages awarded were excessive and reversed them for either a new trial or remittitur, with a cap for this case stated as a multiple of three times the compensatory damages. Thus, as a matter of policy or substantive due process, the Ken-

tucky Court of Appeals tried, for this case, to draw the "mathematical bright line" described as difficult in *Haslip*.

The Kentucky Supreme Court reversed that part of the decision of the Kentucky Court of Appeals, holding in essence that jury discretion was limited only by the "gentle rule" of excessiveness impliedly criticized by this Court in *Gertz*, 418 U.S. at 418. Such a standard did not and cannot protect American National's rights to substantive due process.

This case, like many modern cases, demonstrates the evolution of the "contort". "Contort" cases attempt to recover under a number of theories where the underlying relationship is contractual. California and Montana were quick to permit recovery of punitive damages for the tort of bad faith, one of the claims made by Hanson. *Seaman's Direct Buying Ser., Inc.* v. *Standard Oil Co.*, 686 P.2d 1158 (Cal. 1984); *Nicholson* v. *United Pacific Ins. Co.*, 710 P.2d 1342 (Mont. 1985). However, both California and Montana have recognized the dangers implicit in this approach. *Story* v. *City of Bozeman*, 791 P.2d 767 (Mont. 1990) addressed the problem:

> Parties have traditionally been free to breach their contract and pay contract damages whenever performance was not economically efficient. The relatively simple calculation of whether it is more profitable to breach a contract and pay damages rather than to perform is now complicated by the possibility of more indefinite tort damages.... This problem, however does not support tort damages.

Id. at 774.

Other states have used substantive due process as the basis to reduce punitive damage awards. In *Alexander & Alexander, Inc.* v. *B. Dixon Evander & Assoc., Inc.*, 596 A.2d 687 (Md. Ct. Spec. App. 1991), *cert. denied*, 605 A.2d

137 (Md. 1992), a Maryland Court of Appeals noted that nothing had been done to endanger the public health and safety, and that the defendant's conduct had not been life threatening. It then reversed the award of punitive damages stating:

> If faced with a punitive award that was entered upon proper procedure but which nonetheless contravenes due process because it is out of all proportion to both the harm caused and the perniciousness of the conduct, we could not, on the ground of judicial impotence, allow the unconstitutional award to stand.

Id. at 710. Those same considerations should have been applied in this matter.

While a "mathematical bright line" may be difficult to draw, a reasonable line should be drawn. In her dissent in *Haslip*, Justice O'Connor noted the explosion of punitive damages. She correctly attributed much of it to the type of changes discussed by the Supreme Court of Montana in *Story*, 791 P.2d 767. This Court should recognize that constitutional constraints exist on the size of an award of punitive damages and so hold in this case.

The common law, from which punitive damages have evolved suggests at least two criteria by which the size of an award of punitive damages may be measured. First, the award of punitive damages must bear some rational relationship to the injury suffered. Secondly, the award of punitive damages must meet the state's interest in deterrence while at the same time, not destroy the defendant. When the award of punitive damages in this case is measured against these criteria, it is excessive.

A. Punitive Damages Must Bear A Relationship To The Injury.

Under Kentucky law the amount of punitive damages must bear a reasonable relationship to the injury caused.

Louisville & N.R. Co. v. *Roth*, 114 S.W. 264 (Ky. 1908). The injury to Hanson was the destruction of the Company. The injury inflicted was financial. There was no personal injury, loss of life, or a danger of either. This led the Kentucky Court of Appeals to say:

> The award of compensatory damages was substantial and would seem to have more than slight deterrent effect on future deceptive conduct by the Bank. Comparing the amount of punitive damages assessed with the injury sustained and the fraud which caused it, and taking into account the relevant statutory factors, we believe that the award made by the jury was so disproportionate that the trial court should have interfered.

(App., p. 32a). Thus, the Kentucky Court of Appeals engaged in what was, in essence, a partial *Haslip* review and determined that given the relevant statutory factors, and the nature of the injury, that the punitive damages were excessive. It was that analysis which the Supreme Court of Kentucky reversed, and by so doing, deprived American National of its constitutional due process.

When the trial court engaged in its post-trial analysis, it reviewed the punitive damage award only as a numerical factor of the compensatory damages. In so doing, it compared those damages to cases decided by the Supreme Court of Kentucky involving physical injury. The trial court and the Supreme Court of Kentucky compared apples to oranges. There was no physical injury cognizable in this matter.

However, the most reasonable explanation of the amount of the punitive damage award in this case is that the Bank was denied its procedural rights to due process. Testimony regarding psychological and physical injuries was presented to the jury and it was not instructed to

disregard them. Procedural errors such as these clearly caused the punitive damage award to exceed any rational relationship to the actual injury. By affirming these damages, the Kentucky Supreme Court permitted American National's rights to substantive due process to be violated.

B. Punitive Damages Must Not Destroy The Defendant.

Additionally, the common law and Kentucky courts have recognized the interest of the state in punishment and deterrence. In *Bisset* v. *Goss*, 481 S.W.2d 71 (Ky. 1972), the former court of appeals, now Supreme Court of Kentucky, quoting from 25 C.J.S. *Damages* §117(1) (1966), noted:

> According to the more generally accepted doctrine, such damages are allowed not because of any special merit in the injured party's case, but are awarded by way of punishment to the offender, and as a deterrent, warning, or example to the defendant and others, or even, it has been said as an expression of the indignation of the jury.

Bisset, 481 S.W.2d at 74. This Court approved punishment and deterrence as a part of the state's rational decision making. *Haslip*, 111 S.Ct. at 1044. Concepts of punishment and deterrence, however, are not without limitation. The principle limitation imposed by the common law on punishment is that it may not destroy the defendant.

The United States Court of Appeals for the Second Circuit faced solely and squarely the question of excessive punitive damages in *Vasbinder* v. *Scott*, 976 F.2d 118 (2nd Cir. 1992). The action was brought by a former employee against an employer under 42 U.S.C.A.§1983 (West 1981). Liability had been determined in a previous trial and ap-

peal. In the subsequent trial, the employee was awarded punitive damages of $150,000.00. In its review, the Second Circuit stated:

> Accordingly, an award should not be so high as to result in the financial ruin of the defendant (citation omitted). Nor should it constitute a disproportionately large percentage of a defendant's net worth. Thus, while a defendant's conduct is obviously germane to the damages issue, 'even outrageous conduct will not support an oppressive or patently excessive award of damages' (citations omitted). Further, because neither compensation nor enrichment is a valid purpose of punitive damages, an award should not be so large as to constitute 'a windfall to the individual litigant' (citations omitted). Finally, in applying these principles, we must engage in an independent and 'detailed appraisal of the evidence bearing on damages' (citation omitted).

Id. at 121.

In *Herman* v. *Sunshine Chem. Specialties, Inc.*, 608 A.2d 978 (N.J.Super. Ct. App. Div.), *cert. granted*, 614 A.2d 620 (N.J. 1992), the Superior Court of New Jersey reviewed an award of punitive damages in a negligence action. The court recognized that the evidence of the financial condition of the defendant was a necessary factor for review because it "must be reviewed by an appellate court to determine if it 'exceeds the level necessary to properly punish and deter. . . .'" *Id.* at 985 (quoting *Adams* v. *Murakam*, 54 Cal. 3d 105, 813 P.2d 1348, 1350, 284 Cal. Rptr. 318 (1991)).

The decision of the Supreme Court of Kentucky in this matter presents an anomaly in Kentucky law. Under prior case law, in actions for punitive damages, the parties were not permitted to present evidence of the financial condition of either side of the litigation. *Hensley* v. *Paul Miller*

Ford, Inc., 508 S.W.2d 759 (Ky. 1974). However, in 1988, the Kentucky legislature enacted KY. REV. STAT. ANN. §§ 411.184 and 411.186 in an attempt to reduce awards of punitive damages. The "profitability of the misconduct of the defendant" is one of the criteria to be evaluated. KY. REV. STAT. ANN. §411.186(c). In its review of the punitive damages, the Supreme Court of Kentucky ignored this Court's guidance in *Haslip*, and the Kentucky legislature's statutory guidelines.

Hanson presented to the jury the financial condition of American National. Hanson's evidence established that in the year of his alleged wrong, American National lost [$743,000.00]. The balance sheet revealed to the jury showed that the total equity of the Bank was $11,897,000.00. The jury awarded Hanson $5,775,000.00 in punitive damages. That award represented 48½% of the total equity of the Bank.

Absent the intervention of the holding company, it would have reduced the capital of the Bank to $6,122,000.00 giving it a capital to assets ratio of 3.3%, well below regulatory standards for national banks. Without the financial support and strength of the Bank's holding company, its very existence as a viable entity would have been jeopardized by this award of punitive damages. The Supreme Court of Kentucky refused to consider this fact[12]. Its refusal denied American National substantive due process.

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[12]In a "lender liability" case similar to this case (allegations of fraudulent misrepresentation in regard to future financing), the Supreme Court of Mississippi, in reversing a judgment against a bank, took judicial notice that a bank occupies the unique position of simultaneously being a "public institution and a private investment." *Bank of Shaw* v. *Posey*, 573 So.2d 1355, 1363 (Miss. 1990).

CONCLUSION

When confronted with this Court's opinion in *Haslip*, other states have modified their standards and procedures to afford defendants constitutional due process rights with respect to the award of punitive damages. Kentucky, however, refuses to do so. While it paid only lip service to *Haslip*, it in reality reaffirmed the gentle rule of excessiveness, which this Court suggested in footnote 10 to *Haslip* was unacceptable.

This Court should review the decision of the Kentucky Supreme Court to insure that the *Haslip* standards for the due process review are carried out consistently, if not identically, by the various states. *See, Garnes*, 413 S.E.2d 897. If the decision of the Kentucky Supreme Court is not reviewed, the citizens of this Commonwealth will suffer the unconstitutional imposition of punitive damages by state action conditioned only upon the most cursory review by the trial courts, the "first blush" test. Kentucky citizens will not have the added protection of a review of fact criteria for the award by appellate courts. The citizens of Kentucky should enjoy a level of due process protection consistent with that of other states whose court's have correctly read the decision of this Court in *Haslip*.

This Court should grant the Bank's Petition for Certiorari and, upon review, vacate the judgment of punitive damages against the Bank.

Respectfully submitted,

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APPENDIX

RENDERED: December 17, 1992
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

91-SC-375-DG

H. C. HANSON, VIRGINIA HANSON,
H. C. HANSON CONSTRUCTION COMPANY, INC., and
CONSTRUCTION ENGINEERS, INC. - - - *Appellants*

Appeal From Court of Appeals
v. *Nos. 89-CA-000639 and 89-CA-000690*
(Warren Circuit Court No. 87-CI-318)

AMERICAN NATIONAL BANK & TRUST COMPANY - *Appellee*

AND

91-SC-377-DG

AMERICAN NATIONAL BANK & TRUST COMPANY - *Appellant*

Appeal From Court of Appeals
v. *Nos. 89-CA-000639 and 89-CA-000690*
(Warren Circuit Court No. 87-CI-318)

H. C. HANSON CONSTRUCTION COMPANY, INC.,
H. C. HANSON, VIRGINIA HANSON,
CONSTRUCTION ENGINEERS, INC., and
LUCILLE KINSLOW - - - - - - - - *Appellees*

OPINION OF THE COURT
BY SPECIAL JUSTICE PAUL L. MADDEN
REVERSING IN PART AND AFFIRMING IN PART

This is a consolidated appeal which raises several issues in the context of a lender liability claim. This Court has granted discretionary review of a decision of the Court of Appeals.

At the conclusion of a lengthy trial the jury returned a verdict finding the Defendant, American National Bank (hereafter referred to as Bank), had fraudulently induced the Plaintiffs, H. C. Hanson, his wife, Virginia Hanson, H. C. Hanson Construction Company, and Hanson Engineering, Inc., (hereafter referred to as Hanson), to restructure a loan on terms that the Bank had no intention of performing. The jury awarded Hanson compensatory and punitive damages.

The following statement of the facts of this case is not intended to be complete but is necessary for an understanding of the issues presented.

H. C. Hanson is the owner of Hanson Construction Company, Inc. and Hanson Engineering, Inc. These companies are engaged in the bridge construction industry. Hanson and the companies have been customers of the Bank since the 1970s and conducted most dealings with Mr. David Chestnut, a Bank officer.

During the early 1980s, Hanson began to experience financial difficulty and the Bank continued to finance the business. By 1985 Hanson had several notes at the Bank signed by Hanson personally and in his corporate capacity for the companies.

In 1985 American National Bank was acquired by First Kentucky National Corporation. In the same year a First Kentucky task force began a review of the customer accounts at American National to reclassify any substandard accounts. To avoid public reaction to the review process, customers, including Hanson, were not informed when their accounts were being reviewed and reclassified as substandard by the task force nor was Hanson advised that a memorandum had been prepared recommending that the Hanson debts be restructured and the line of credit be restricted. That interbank memo, dated July 8, 1985, rec-

ommended that the Bank obtain a second mortgage on the Hanson's home and farm, then titled to Virginia Hanson, to secure the restructured debts, to limit the line of credit, and to use a cut off of that credit to force Hanson to sell his personal holdings. The memo suggested that with the plan and by postponing foreclosure for several months the Bank would reduce its potential loss. This plan was refined and approved by the task force. Members of the task force met with Mr. Hanson to discuss the restructure. Hanson refused their plan. Mr. Hanson contacted Mr. Chestnut who explained the restructure plan given him. Mr. Hanson testified that Mr. Chestnut told him the Bank would finance up to 20% of new construction contracts to be rewritten annually until the jobs were completed. On July 15, 1985, Hanson drafted a letter in which he proposed a 15 year term on the restructured debt, a $125,000.00 line of credit and a $100,000.00 letter of credit secured by a second mortgage on the home and farm. The Bank informed Hanson that the entire debt must be secured by the second mortgage. Mr. Hanson testified that Chestnut notified him that with the second mortgage securing the full restructured debt, the Bank would give Hanson a $125,000.00 line of credit, provide financing for future contracts up to 20% of the contract amount and allow 15 years for repayment of the restructured loan.

The documents were prepared by the Bank's attorney and the restructured loan was closed on July 26, 1985. The closing document contained almost 100 pages. At the closing Mr. Hanson began to read the documents. The Bank's representative protested because of the length of time it would take and Hanson was assured that the documents contained all the understandings. Relying on this assurance, Mr. Hanson did not read the documents but did sign them. Contrary to Hanson's understanding, the closing documents did not contain terms for financing as allegedly represented by Mr. Chestnut.

In the spring of 1986, Mr. Hanson obtained contracts for two bridges and obtained a $175,000.00 line of credit from the Bank for this project. This debt is evidenced by a demand note dated June 1986. In October 1986, Hanson obtained a contract to build a bridge in Powell County but no financing by the Bank was requested at that time.

In January 1987, Hanson contacted the Bank for a loan on the Powell County project and on a bridge contract in Lewis County and for a reduction in interest. The Bank denied the request for funding in these two projects, denied the interest reduction and stopped additional draws on existing lines of credit. The Bank did agree to allow for draws of up to $21,000.00 to meet payroll and thereby allow time for Hanson to seek alternative financing. On March 11, 1987, the Bank demanded full payment of a 1984 note. The restructured note was called after Hanson missed the next scheduled payment.

Hanson filed the action in April 1987, alleging that the Bank's action in February and March 1987 forced Hanson Construction out of business. Hanson alleged breach of a fiduciary duty owed by the Bank, recision of the contract, and fraud and misrepresentation. The Bank counterclaimed for the debt owed it by Hanson. At the conclusion of the evidence the trial court entered a directed verdict for the Bank on the issue of breach of a fiduciary duty and recision of the contract. The trial court submitted to the jury only the issues of fraud and misrepresentation. The jury found for Hanson and awarded compensatory damages of $1,065,000.00 and punitive damages of $5,775,000.00. The trial court entered judgment on the verdict less amounts owed to the Bank by Hanson on the various notes, interest and legal fees. The Bank's motion for new trial and judgment NOV were heard by the trial court and denied.

The Court of Appeals affirmed the judgment of the trial court in all matters except the award of punitive damages.

The Court of Appeals reversed as to punitive damages and remanded the case to the trial court for remittitur of excessive punitive damages or the grant of a new trial on punitive damages. This Court has granted discretionary review to examine the claims of errors by the parties.

The decision and order of the Court of Appeals in remanding the matter to the trial court for remittitur of the excess of punitive damages or new trial on those damages is reversed. The decision of the Court of Appeals affirming the judgment in the award of compensatory damages is affirmed.

This is a tort action for compensatory and punitive damages for fraud and misrepresentation. This Court has held in *Kentucky Electric Development Co.'s Receiver* v. *Head*, Ky., 68 S.W.2d 1 (1934), where a fraud has been perpetrated to induce a party to enter into a contract, the injured party may elect to affirm the contract and recover damages in tort for the fraud or disaffirm the contract and recover the consideration with which he has parted. *Bryant* v. *Troutman*, Ky., 287 S.W.2d 918 (1956).

At the conclusion of the evidence Hanson chose the remedy to pursue. Since Hanson affirmed the contract, the trial judge directed a verdict on the contract documents for the Bank in the amount of the debts evidenced by the notes, interest and legal fees. The trial court submitted to the jury only the tort claim and instructed the jury accordingly, permitting the jury to assess damage, if any, for fraud.

The Bank argues that the trial court erred in not advising the jury of its directed verdicts against Hanson in the claims based on fiduciary duty and oral contract and claims for physical injury. The Bank contends that since the court did not instruct the jury of the directed verdicts, the jury was allowed to consider the evidence it heard of these claims in awarding the compensatory and punitive

damages. This Court cannot accept the argument. We find no authority to support that contention nor has any been cited to us. The Civil Rules, specifically CR 50.01, do not require that special instruction to the jury, and this Court is not prepared to hold that such an instruction should be given. It is within the discretion of the trial judge to determine whether that instruction should be given to the jury.

This case was submitted to the jury on interrogatories for special verdict thereby limiting the jury in its fact finding function. A special verdict in response to written questions made in accord with CR 49.01 best prevents the jury from considering immaterial issues and submits to the jury only the appropriate contested issues. *Robinson* v. *Murlin Phillips & MFA Insurance Company,* Ky., 557 S.W.2d 202 (1977). *Ford Motor Company* v. *Fulkerson,* Ky., 812 S.W.2d 119 (1991). The jury's verdict was returned on the issues submitted: whether the Bank made fraudulent misrepresentations to Hanson and Hanson justifiably relied upon such misrepresentations to their detriment.

The Bank argues that the representation or promises made by the Bank to Hanson were too indefinite to form the basis for a contract and therefore are unenforceable: Where the representations are not enforceable as contracts, as a matter of law, the representations cannot be the basis for an action for fraud. The essential element in an action for fraud is not whether the representation is the consideration for contract for which a separate action may lie.

> Since a promise necessarily carries with it the implied assertion of an intention to perform it follows that a promise made without such intention is fraudulent and actionable in deceit . . . This is true whether or not the promise is enforceable as a contract. *Restatement (Second) of Torts § 530* Comment c (1976).

The inducements presented by the Bank were specific: financing 20% of future projects, 15 year repayment of the restructured debt if paid as a agreed and a $125,000.00 line of credit. It was for the jury to decide if it was reasonable for Hanson to rely upon such inducements and whether Hanson in fact did rely.

The Bank contends that Hanson's failure to read the contract documents must, as a matter of law, bar any claim, including one based on fraud, which alleges facts or promises contradicted by the written contracts. Where the oral representations are contrary to the written language of the contract, recision of the written contract should not be permitted by the party who failed to read it. However, that party may yet have a cause of action based on fraud and deceit against the person who induced him to sign the contract. *Cline* v. *Allis-Chalmers Corporation,* Ky., 690 S.W.2d 764 (1985).

Where there is evidence that a party to a contract is induced to signing the contract without reading it, it is a question for the jury to determine whether that party exercised ordinary care under the circumstances in doing so. *Kreate* v. *Miller,* 11 S.W.2d 99 (1928).

If the jury determines that the party signing the contract without reading it exercised ordinary care and that the person who induced the party did so through fraud and misrepresentation, a tort action for fraud is the appropriate remedy.

Hanson presented evidence that he did not have an opportunity to read the contract, that he was discouraged from doing so, that the Bank had the documents several days before the closing and had not made these available to him for review, that he was discouraged from obtaining separate counsel to examine the documents and of the manner in which the Bank presented itself to obtain his confidence, all coupled with the assurances that the documents

were prepared as he and the Bank had agreed. In light of this evidence, it was properly left for the jury to determine whether Hanson exercised ordinary care of whether Hanson's failure to do so was so imprudent as to bar recovery for deceit.

The Bank argues that the loan documents must be enforced as written and any evidence to the contrary must be excluded under the parol evidence rule. It concludes that under this well-established rule that even though the evidence of the oral promise may prove fraud, all such evidence is inadmissible since it is at variance with the written document. The Bank would extend the parol evidence rule to include tort actions based on fraud and deceit. We do not accept its arguments. The rule announced in *Bryant* v. *Troutman*, Ky., 287 S.W.2d 918, 920 (1956), is accurately stated.

> The rule is that parol testimony is not admissible to vary the terms of a writing. When the negotiations are completed by the execution of the contract, the transaction, so far as it rests on the contract, is merged in the writing. But false and fraudulent representations made by one of the parties to induce the other to enter into the contract, are not merged in the contract. Parol evidence is admissible to show that the making of the contract was procured by fraudulent representations. This does not vary the terms of the contract.

The Bank claims that Hanson's action is based on an oral promise by the Bank to finance future projects and to renew the restructured note after three years to be paid over a period of 15 years; since that agreement could not have been performed within one year, any action on that oral agreement is barred by KRS 371.101. The Court of Appeals accurately defined the rule in this state that our statutes do not abrogate the common law remedy for fraud

merely because the fraudulent misrepresentation is not in writing. The rule has been unchanged since announced by this Court in *Vertrees* v. *Head & Matthews*, 127 S.W. 523, 524, 525 (1910).

> That part of the statute of frauds invoked to defeat a recovery has no application to the state of facts set out in the petition. If a person, in violation of law, or deceitfully or fraudulently, or with knowledge of its falsity, makes a representation or assurance concerning the character or credit of another, it is not essential to maintain a cause of action against him that such representation or assurance shall be in writing. The statute does not embrace assurances or representations that are deceitfully or fraudulently made, or that are made with knowledge of their falsity, or in violation of a statute. It was not intended to save harmless from consequences of false and fraudulent statements of wrongdoers, or those who for purposes of gain or other motive would cheat or mislead. It was designed to protect persons who honestly and in good faith made assurances respecting the credit or standing of another, and should be confined to this character of cases.

The Bank claims that inasmuch as Hanson continued to make draws on the line of credit to meet the payroll and made payments on the debt after February 5, 1987, the date on which Hanson was informed that the Bank would not grant his request for added funding and would not honor the commitment in future financing, Hanson waived any action for fraud and thereby condoned the fraud, as a result of which, there is no viable claim of fraud to submit to the jury.

The Court of Appeals rejected the Bank's contention in holding the maintenance of an action in tort for fraud is based on the acceptance of the contract and the claim is

not barred by mere acts of affirmance. In *Sanford Construction Company* v. *S & H Contractors, Inc.*, Ky., 443 S.W.2d 227 (1969), this Court held that a defrauded party who has substantially performed his contract before discovery of the fraud may go on with the performance and also recover damages. Where the terms of the contract were not wholly executory at the time the fraud was discovered, but had been performed, the claim for fraud and misrepresentation was the appropriate avenue.

The Bank suggests that Hanson's evidence of loss for the destruction of Hanson's construction business was too speculative and that, as a matter of law, the proof of damages does not meet the standard of reasonable certainty announced in *Pauline's Chicken Villa, Inc.* v. *KFC Corporation*, Ky., 701 S.W.2d 399 (1986). The basis for its assertion is that Hanson's expert witness, called to prove damages, rejected consideration of Hanson's history and thereby ignored the best available evidence. In *Pauline's Chicken Villa* this Court held that it cannot elucidate a single definition of "reasonable certainty."

In *Kellerman* v. *Dedman*, Ky., 411 S.W.2d 315 (1967), this Court quoted from the Wisconsin decision in *Essock* v. *Mawhinney*, 3 Wis.2d 258, 270, 88 N.W.2d 659, 664 (1958).

> [I]t is now generally held that the uncertainty which prevents a recovery is uncertainty as to the fact of the damage and not as to its amount and that where it is certain that damage has resulted, mere uncertainty as to the amount will not preclude the right of recovery. This view has been sustained where, from the nature of the case, the extent of the injury and the amount of damage are not capable of exact and accurate proof. Under such circumstances all that can be required is that the evidence with such certainty as the nature of the particular case may permit lay a foundation which will enable the trier of facts to make

> a fair and reasonable estimate and the plaintiff will not be denied a substantial recovery if he has produced the best evidence available and it is sufficient to afford a reasonable basis for estimating his loss.

In the case before us, the witness did establish his qualifications and the fact that the methods used by him are recognized methods for valuing companies. His methods did consider past performances of this company and its improving future of increasing work, its backlog, anticipated growth and other factors.

We conclude there was adequate competent evidence presented during the trial of the case to support submitting the instruction to the jury on the issue of compensatory damages.

The next claim of error is the charge by the Bank that the trial court erred in giving a jury instruction that it was the duty of the Bank to act in good faith. The Bank insists that since the notes signed by Hanson were demand notes, already due and subject to being called at any time without reason, it was improper for the trial judge to impose upon the Bank the added duty to act in good faith, a duty not imposed in the contract documents. We do not reach the issue of whether a duty of good faith is owed in calling a demand note. Under the instruction to the jury, the award of damages could only be made on a finding of fraudulent misrepresentation. The jury's finding of fraud alone supports the award. The instruction on fraudulent misrepresentation given by the court to the jury clearly and accurately defines the essential elements that Hanson must prove and the jury must find to establish a claim for fraudulent misrepresentation. The addition of the good faith instruction added nothing and, even if it were erroneously given, it is a harmless error.

This Court cannot accept the Bank's contention that since banking is an industry subject to strict federal and

state regulations that openly discourage, if not prohibit, it from making loan commitments and promises similar to those the jury determined were made in the case, that as a matter of public policy the banking industry should not be held liable when it attempts to cut its losses by discontinuing and cutting off the credit of customers it believes are a poor business risk.

The idea that any person or industry or enterprise would be immune from liability for fraud and deceit is not acceptable. *Bryant* v. *Troutman*, Ky., 287 S.W.2d 918 (1956).

> The law should not, and does not permit a covenant of immunity to be drawn that will protect a person against his own fraud. Such is not enforceable because of public policy. Language is not strong enough to write such a contract. Fraud destroys all consent. It is the purpose of the law to shield only those whose armor embraces good faith.

The Bank argues that Hanson established no basis for the award of punitive damages. In light of what has been said earlier in the opinion, we cannot accept such an argument. We have found that there is sufficient evidence and therefore reasonable grounds for submitting to the jury the issue of fraud and misrepresentation. Once the jury had found that the Bank intentionally misrepresented and deceived Hanson, an instruction on punitive damages should have been given and the jury afforded the opportunity to asses such sums as it considered appropriate. The trial court submitted instructions applying the factors set out in KRS 411.186. The constitutionality of this statute is not in issue in this case.

The case reaches this Court on the issue of the instructions by the trial court to the jury on punitive damages and on the issue of remittitur. The Court of Appeals found that since the jury's award of compensatory damages was substantial, it would by itself be a deterrent of future de-

ceptive practices and that in comparing the punitive damages assessed by the jury with the fraud that caused it, when taking into consideration the relevant statutory factors, the jury's award of punitive damages was disproportionate.

The court concluded that the award of punitive damages was the result of a failure in the instructions to identify a measure for fixing the amount of such damages. The court concluded that to the extent the award of punitive damages exceeded three times the compensatory damages, it was excessive and the excess should be remitted or a new trial ordered. This Court is unaware of any authority in this jurisdiction for court-ordered remittitur of punitive damages or for the fixing of the amount of such damages, and it will not here establish such precedent.

In *Pacific Mutual Life Insurance Co.* v. *Haslip*, ___ U.S. ___, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), the United States Supreme Court reaffirmed its earlier ruling that an award of punitive damages does not violate the due process clause of the Constitution. That Court did identify the parameters the trial court and appellate court should apply in insuring that an award of punitive damages meets the test of due process. The Court held that instructions to the jury must define the purpose of punitive damages as punishment to the wrongdoer and as a deterrent to wrongdoers and others from such activities in the future and that post-trial procedures be in place and utilized by the trial court to scrutinize the award of such damages. The instructions here were adequate under *Haslip*.

The trial court instructed the jury in accordance with the provisions of KRS 411.184 and 411.186. The judge set forth in detail the definitions and standards the jury was to use in its deliberation in deciding whether punitive damages should be awarded and, if so, in what amount.

Such instructions are the only guidance that may be given the jury. Reasonable men and women will differ in determining the amount of exemplary damages, but so long as the jury's decision is based on competent evidence, is free of passion or prejudice, and is appropriately reviewed by the trial judge, we find no basis for substituting the Court's opinion in the place of the jury's.

In the present case, the jury was given an instruction that met the standards in *Haslip* and the post-trial review by the trial court of the punitive damages award conformed to the *Haslip* test. We find no basis in the Bank's argument.

This Court is mindful that Congress has enacted statutes that establish the amount of exemplary damages by permitting treble damages in certain cases. These caps are specified for certain statutory actions, not constitutionally protected actions. This Court is not inclined to enact law on the measure of punitive damages. Such is a matter for the legislature, provided it can be done consistent with our Constitution.

It is with equal caution that this Court does not substitute its opinion as to the amount of exemplary damages for that of the jury. It was the trial jury and trial judge who heard all the evidence and had the opportunity to see and hear the witnesses during the lengthy trial. The sanctity of the jury verdict is at the heart of out judicial system.

The procedures for review of the jury verdict are stated in CR 59.01. To assist the trial court in applying the test of determining whether a verdict is given under the influence of passion and prejudice, the "first blush rule" was adopted. *Davis* v. *Graviss,* Ky., 672 S.W.2d 928 (1984).

The Court of Appeals concluded, as does this Court, that in the award of punitive damages there is no basis on which to find the award was the product of passion or prejudice. But unlike the Court of Appeals, this Court

does not agree that the verdict of punitive damages is the result of a failure in submitting to the jury an instruction on a precise measure to be used in establishing the amount of such damages.

The Bank contends that by allowing evidence of the acquisition of American National Bank by First Kentucky National, Hanson was permitted to focus on the acquisition and thereby influence the jury in the award of compensatory and punitive damages. We cannot accept this assertion. We would agree with the Bank if the evidence of the takeover served no purpose other than to inflame or prejudice the jurors against outsiders. But here it was established that the takeover of American National Bank by First Kentucky was common knowledge and had been extensively advertised by both banks since 1985. More importantly, the evidence of the takeover is relevant and material in Hanson's proof of the acquisition, Hanson's claim of fraud would appear more a paranoid reaction than a meritorious claim. We see no reason to reject the standard of relevance announced in *Ford Motor Company* v. *Fulkerson*, Ky., 812 S.W.2d 119 (1991), that it is within the discretion of the trial judge whether the probative value of the evidence outweighs its inflammatory nature. There is nothing inflammatory in the evidence of the acquisition of American National Bank by First Kentucky that would unduly prejudice the jury against the Bank.

The decision and order of the Court of Appeals in remanding the matter to the trial court for remittitur of the punitive damages awarded or a new trial on those damages is reversed. The decision of the Court of Appeals affirming the judgment in the award of compensatory damages is affirmed.

All concur.

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COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

89-CA-639-MR

AMERICAN NATIONAL BANK & TRUST COMPANY - *Appellant*

Appeal From Warren Circuit Court
v. *Honorable Joseph R. Huddleston, Judge*
Action No. 87-CI-318

HANSON CONSTRUCTION CO., INC.,
H. C. HANSON, VIRGINIA HANSON,
CONSTRUCTION ENGINEERS, INC., and
LUCILLE KINSLOW - - - - - - - - - *Appellees*

89-CA-690-MR (CROSS-APPEAL)

HANSON CONSTRUCTION CO., INC..,
H. C. HANSON, VIRGINIA HANSON, and
CONSTRUCTION ENGINEERS, INC. - - *Cross-Appellants*

Cross-Appeal From Warren Circuit Court
v. *Honorable Joseph R. Huddleston, Judge*
Action No. 87-CI-318

AMERICAN NATIONAL BANK & TRUST
COMPANY - - - - - - - - - - - *Cross-Appellee*

AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

BEFORE: DYCHE, HAYES, and WILHOIT, Judges.

WILHOIT, JUDGE. H. C. Hanson Construction Company, H. C. and Virginia Hanson, and Construction Engineers, Inc.,

filed suit in April 1987 against American National Bank and Trust Company seeking compensatory and punitive damages from the Bank's termination of credit and calling of notes. The plaintiffs' trial theories included fraudulent misrepresentation, bad faith, emotional distress, breach of fiduciary duty, and oral contract. After the trial court entered directed verdicts on most of the alleged claims, the jury was instructed on fraudulent misrepresentation and the duty of good faith. The appeal by the Bank is from a judgment entered pursuant to the jury verdict awarding $1,065,000.00 compensatory damages and $5,775,000.00 punitive damages, which amounts were subject to set-offs for the unpaid principal and interest on the notes and an amount for attorney fees based on the loan documents. H. C. and Virginia Hanson, H. C. Hanson Construction Company, and Construction Engineers, Inc., cross-appeal from the portion of the judgment awarding the Bank attorney fees.

The trial was lengthy with the plaintiffs' proof taking about three weeks and the Bank's proof about two weeks. The following is not a summary of the evidence, but only highlights the facts necessary for an understanding of the issues presented in the appeal and cross-appeal.

Hanson Construction Company, owned by H. C. Hanson, was primarily involved in bridge construction. Mr. Hanson had been a customer of the Bank since the 1970's and Mr. David Chestnut was the Bank's loan officer who dealt with the Hansons from 1974 to at least 1982. Chestnut continued to communicate with the Hansons for the Bank after that date. Construction Engineers was a company formed by Mr. Hanson and others. Mr. Hanson eventually became the sole stockholder of that concern.

Like other businesses involved in the construction industry, Hanson Construction had problems generating a profit after 1982. The Bank continued to finance Hanson

through the lean years; by mid-year 1985 Hanson Construction had seven secured notes with the Bank, and Construction Engineers had an additional note. Hanson signed all the notes in both his corporate and personal capacities. Virginia Hanson signed a December 1983 note for $175,000.00 and also signed a personal guaranty for $125,000.00. The Bank was acquired by First Kentucky National Corporation in early 1985, an event which the Hansons characterize as changing their relationship with it.

Unbeknownst to the Hansons, after the acquisition their loans were reclassified substandard. Mr. Thomas Gurbach, a First National management trainee, was assigned the task of reviewing the Hansons' accounts. Gurbach authored what the Hansons refer to as the "Gurbach Memo" dated July 8, 1985. In the memorandum Gurbach recommended restructuring the Hansons' debt and giving Hanson a letter of credit and a restricted line of credit. The memo also contained a recommendation that the Bank secure additional collateral including a second mortgage on the Hansons' home. The Hansons highlight the portion of the memorandum where Gurbach indicated that "if ANB waited three to five months to foreclose it could come out with no loss due to the taking of additional collateral . . . . [T]his cash will have to come from the sale of his personal assets, in order to keep his company alive. . . . Overall this rewrite should reduce the Bank's potential loss and force Mr. Hanson to sell off his personal assets which undoubtedly would bring more than if the Bank auctioned them off." Hanson met with Gurbach and Mr. Willie McElroy, an officer at the Bank, to discuss the restructuring. Hanson informed Gurbach and McElroy that his wife, who had sole title to their residence, would not agree to a second mortgage on the house, and the meeting ended with no resolution. Hanson thereafter contacted Chestnut. Hanson testified that Chestnut told him that the Bank would finance

new work up to 20 percent of the contract amount at the Bank's interest rate in effect at the time of the contract, and the term for a line of credit would be one year to be renewed until completion of the work. Hanson drafted a letter July 15, 1985, in which he proposed a 15-year term note, $125,000 line of credit, and a $100,000 letter of credit secured by a second mortgage on the Hansons' residence and farm. McElroy informed the Hansons that the second mortgage would have to secure the Hansons' entire indebtedness to the Bank. Hanson testified that after his letter, Chestnut told him that with a restructuring and a second mortgage on the house and farm, the Bank would give Hanson Construction a $125,000 line of credit, provide financing for future contracts, and allow 15 years for repayment on the restructured loan.

The restructured loan was closed July 26, 1985. A February 1984 demand note was not included in the restructuring. Hanson started to read the closing documents, consisting of almost 100 pages, but the Hansons and their corporate secretary all testified that protests were made over the length of time it would take to read the material. Hanson testified that he was assured the documents were prepared in accordance with his understanding. As a consequence, Hanson did not read the closing documents. Contrary to Hanson's understanding, the restructuring did not include the alleged representations made by Chestnut. The restructured loan also did not conform to the "Gurbach memo" in all respects. The note signed for the restructured loan provided that no payments of principal or interest were due in December, January, or February of each year.

Hanson sought a loan from the Bank in the spring of 1986 to purchase equipment; that loan was denied. Hanson Construction obtained a subcontract to build two bridges in Campbell County, Kentucky, and Hanson successfully

obtained a $175,000 line of credit from the Bank for this project. A demand note representing the line of credit was signed in June 1986. Hanson subsequently subcontracted the smaller of the two bridges to Dixie Engineering, Inc., a company owned until December 1986 by Hanson, his wife, and their two sons. (In December 1986, all stock in Dixie was transferred to one of the sons.) The letter of credit for bonding from the Bank expired in July 1986, and Hanson associated with another Bowling Green contractor to obtain a performance bond for the Campbell County project.

Hanson Construction obtained a subcontract in October 1986 to build a bridge in Powell County. No financing from the Bank was sought for the subcontract at that time. The Bank maintained that Hanson Construction's fiscal 1986 statements contained material misstatements such that instead of the $3,500 profit alleged by Hanson, the company sustained a loss of over $94,000. Hanson approached McElroy in January 1987 for loans for Powell County and Lewis County subcontracts. The Executive Loan Committee of the Bank denied Hansons' request for funding for the Powell and Lewis subcontracts, as well as Hansons' request for an interest reduction. The committee also decided to preclude additional draws on existing lines of credit. After meeting with Hanson on February 6, 1987, the Bank allowed him to draw $7,000 a week for three weeks to meet payroll and seek alternative financing. Hanson made a quarterly interest payment February 6, 1987, on the 1986 demand note, and a payment on February 18 on the 1984 demand note. American demanded payment in full of the 1984 and 1986 notes on March 11, 1987. The restructure note of July 1985 was called after Hanson missed the next scheduled payment.

Hanson maintains that the Bank's actions in February and March 1987 forced Hanson Construction out of business on March 23, 1987. Negotiations between Hanson

and the Bank continued until Hanson filed suit April 13, 1987.

The Bank argues first that the loan documents must be enforced as written, and that evidence of any alleged representations by it to Hanson were not properly admitted at trial because of the parol evidence rule and the statute of frauds. We agree with the Bank that parol evidence would not be admissible to vary the terms of the documents by showing a previous or contemporaneous oral contract dealing with the same subject matter as the written documents. *See Citizens National Bank of Glasgow* v. *Damron*, 286 Ky. 43, 149 S.W.2d 762 (1941); *Childers & Venters, Inc.* v. *Sowards*, Ky., 460 S.W.2d 343 (1970). Apparently, the trial court also agreed inasmuch as it dismissed Hanson's claim based on oral contract. This evidence was admissible, however, to establish that Hanson had been induced to sign the documents through the fraudulent misrepresentation of the Bank's agents or employees. *See Bryant* v. *Troutman*, Ky., 287 S.W.2d 918 (1956). Neither *Klein* v. *Citizens Union National Bank*, 281 Ky. 650, 136 S.W.2d 770 (1940), nor *Citizens National Bank of Glasgow* v. *Damron, supra*, cited by the Bank in support of its position, involved fraudulent misrepresentation.

The Bank also argues that because the representations which it allegedly made concerning future financing, etc., were in themselves too indefinite to constitute an enforceable contract, *see Klein* v. *Citizens Union National Bank, supra*, Hanson could not rely upon those representations as a basis for establishing a claim for fraudulent misrepresentation. In support of this argument, it refers us to *Delcon Group, Inc.* v. *Northern Trust Corp.*, 187 Ill. App. 3d 635, 135 Ill. Dec. 212, 543 N.E.2d 595 (Ill. App. 2 Dist. 1989). In that case the court held that as a matter of law the plaintiffs could not rely on an alleged oral contract by which the Bank promised that it would provide them a

line of credit or equipment financing because essential terms of the contract were never agreed upon. The court reasoned that since the plaintiffs knew the alleged contract was too indefinite to be binding on any of the parties, they could not rely on it as binding the Bank. The appellees do not specifically respond to this argument.

The alleged misrepresentations made in this case are that the loan documents contained provisions for future financing of projects of up to 20 percent of the contract amount at the Bank's prevailing interest rate, a 15-year repayment schedule for the restructured loan, and that there would be no foreclosure as long as payments were current. Considering the relationship of the parties and what took place at the closing of the restructured loan according to the appellees' evidence, we cannot say as a matter of law that it would have been unreasonable to rely on the alleged representations by the Bank that these provisions were set out in the loan documents. *See Kreate* v. *Miller,* 226 Ky. 444, 11 S.W.2d 99 (1928). Similarly we do not find the provisions themselves were so indefinite that it would be unreasonable to rely upon their binding effect if, in fact, they had been placed in the written agreements.

Next, the Bank insists that because the Hansons elected to affirm the contract, any claim based upon the tort of fraud is waived and punitive damages may not be recovered. Furthermore, it argues that the election to affirm the contract is a condonation of the alleged fraud according to *Central States Fire Insurance Co. of Wichita, Kan.* v. *Holland,* 219 Ky. 727, 294 S.W. 489 (1927), *Castleman-Blakemore Co.* v. *Pickrell & Craig Co.,* 163 Ky. 750, 174 S.W. 749 (1915), *Perkins* v. *Jackson,* 276 Ky. 217, 123 S.W.2d 247 (1938), and *Dempsey* v. *Marshall,* Ky., 344 S.W.2d 606 (1961). The first three of these cases involve equitable actions to rescind or reform agreements and are not controlling in a tort action such as we have here. The

Dempsey case appears to be a tort case but supports the Hansons' position rather than the Bank's. Indeed, the maintenance of an action in tort for deceit "is based on the acceptance of the contract, it is not barred by mere acts of affirmance." W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts* § 110 at 770 (5th ed. 1984); *see also Hampton* v. *Suter*, Ky., 330 S.W.2d 402 (1959).

In addition to the evidence concerning the assurances made by the Bank that the documents contained the omitted provisions, Hanson testified that he started to read the documents at the closing, but after protest from the Bank's attorney that "this would take all day," he stopped. Hanson also stated that before the closing, when he asked Chestnut if he should have his lawyer present, he was assured that that was not necessary. Further, Chestnut agreed with the statement "[i]f you can't trust your banker, who can you trust?" In light of this and other evidence, we are not prepared to say as a matter of law that Hanson's failure to read the documents was so imprudent as to bar recovery for deceit. *See United Talking Machine Co.* v. *Metcalf*, 174 Ky. 132, 191 S.W. 881 (1917); *Kreate* v. *Miller, supra; Cline* v. *Allis-Chalmers Corp.*, Ky. App., 690 S.W.2d 764 (1985).

Neither was Hanson's claim in tort for fraudulent misrepresentation barred by KRS 371.010. That statute bars an action upon "any agreement that is not to be performed within one (1) year." As stated in *Scott* v. *Farmers State Bank*, Ky., 410 S.W.2d 717, 722 (1966), "[o]ur statutes do not abrogate the common-law remedy for fraud merely because the fraudulent misrepresentations are by parol."

Next, the Bank argues that through the instructions the court erroneously imposed upon it the duty of good faith in calling the demand notes executed by the Hansons, and that a directed verdict in its favor on this issue should

have been entered. We need not concern ourselves with the question of whether a duty of good faith is owed in calling a demand note because any error in this respect could only have been harmless. Under the court's instructions the jury was permitted to award compensatory damages solely on a finding of fraudulent misrepresentation, even if it had not also found as it did that the Bank "breached its duty to deal in good faith . . . in the performance and enforcement of the loan agreements." The jury's finding of misrepresentation alone supports the award aside from any concomitant finding of bad faith.

The Bank contends that it was entitled to an instruction on estoppel. As no such instruction was requested or offered, the Hansons maintain the question is not properly before us under CR 51(3). The Bank insists that their tendered instruction on estoppel is found in Volume XV, at page 2205 of the record.

A proposed instruction followed by interrogatories to be answered by the jury are found at that page of the record. The proposed instruction is to the effect that the jury must find that the Hansons had breached their contractual and statutory duty if it determined that they had supplied false information to the Bank or withheld material information from it. The interrogatories questioned whether the Hansons' financial statements for October 1985 and 1986 were accurate and whether those statements "accurately represented the financial condition of the company." The instruction actually given by the court advised the jury that the Hansons had a duty to act in good faith. "Good faith" was defined as "honesty in fact in the conduct or transactions concerning which you have heard evidence." The jury was then asked whether the Hansons had violated their duty to deal with the Bank in good faith. If the jury answered affirmatively, then no recovery for the Hansons was permitted. From the argument of counsel, it

was made quite clear to the jury that if the Hansons had given the Bank inaccurate or materially incomplete information about their financial condition, they had not acted with honesty in fact.

We conclude that the factual question of whether the Hansons had dealt dishonestly with the Bank, and if so that they were estopped from recovery, was accurately and concisely presented to the jury through the instruction given. We find no reversible error in the court's failure to give the Bank's tendered instruction. *See Collins* v. *Galbraith*, Ky., 494 S.W.2d 527 (1973); *Cox* v. *Cooper*, Ky., 510 S.W.2d 530 (1974). We also believe that the question of whether the Hansons had acted honestly was properly submitted to the jury since there were material factual questions bearing on this issue. Of course, in light of what we have already said, we find no inconsistency in the trial court's directing a verdict in favor of the Bank on the written contract while submitting the tort claim for fraudulent misrepresentation to the jury, although the Bank would have us find otherwise.

At the close of the case for the Hansons, the court directed a verdict against them on their claims for emotional distress, physical injury, fiduciary duty and oral contract. The Bank then moved the court to immediately advise the jury that it need not consider those claims nor "take into consideration the testimony respecting those claims." The court denied the Bank's motion stating that it would wait until the end of the entire case to advise the jury of its directed verdict. At the close of all of the evidence, the Bank asked the court to give an instruction which "would literally instruct the jury" to return a verdict in favor of the Bank on each of the claims for which a directed verdict had been granted. The court declined to do this, and under our practice was not required to so instruct. *See* CR 50.01. No further request was made

about merely advising the jury of the directed verdict, and the court apparently never did. Accepting that it perhaps would have been better practice to have advised the jury of the directed verdict, we see no reversible error on this score.

The trial court did not abuse its discretion in permitting the witness Charles Cowles to testify. The Bank, which was permitted to depose Mr. Cowles before his testimony was presented to the jury, has failed to demonstrate any unfair prejudice by the admission of his testimony. *See Collins* v. *Galbraith, supra.* The Bank also contends that this testimony should not have been admitted because it contradicted a judicial admission already made by Hanson. Aside from the fact that the statement alleged to be a judicial admission is not so clear and unequivocal as to be considered such, *see George M. Eady Co.* v. *Stevenson*, Ky., 550 S.W.2d 473 (1977), the Bank has failed to show that this particular argument was presented to the court before the testimony was admitted. *See* CR 46; 76.12(4)(c)(iv).

The Bank argues that the court erred in submitting "a damage instruction to the jury when the evidence [of damage] was based on the loss of future profits," which it says were speculative at best. The matter of future profits arose, not because the Hansons sought recovery for them, but because future profits were used by the Hansons' expert witness as a factor in calculating the market value of the Hanson Construction Company at the time the Bank cut off its credit, allegedly forcing it out of business. The expert testified that this was an accepted method of evaluation, even that it was a method used universally and was "the most recognized method for valuing companies." The method he employed among other things, considered the past performance of the company; its then-improving situation; its likely profit in the year it ceased operation, based

upon reasonably projected revenue and expenses; and its backlog and conservatively anticipated growth in the future, based upon a number of factors. Considering this evidence presented as a whole, we find that it certainly supported an instruction on damages.

There is no merit to the Bank's position that because "[t]his is a contract case" it was error under KRS 411.184(4) to permit the jury to consider punitive damages. As stated previously, the case submitted to the jury, and upon which the punitive damages were awarded, is one in the tort of deceit.

The Bank also complains that the punitive damages which were awarded violated the fourteenth amendment to the United States Constitution as well as Sections 1, 2 and 14 of the Kentucky Constitution. The basis for this argument seems to be that the jury was given no standard by which to measure the amount of punitive damages it could or should award. While KRS 411.186 does provide for certain factors to be considered by a jury in awarding punitive damages it gives no guidance as to how to measure the amount which should be awarded. However, the Bank again fails to point out how this question has been preserved for our review, *see* CR 76.12(4)(c)(iv). From our review of this voluminous record, it does not appear the trial court was ever asked to incorporate into the instructions any standards governing the amount of punitive damages which the jury could award. The only objection we find to the punitive damage instructions is that the evidence was "not of sufficient quantity or quality to justify that." *See* CR 51(3).

The Bank's next contention is that since the award of punitive damages was so excessive that it failed to pass the "first blush rule" referred to in *Davis* v. *Graviss*, Ky., 672 S.W.2d 928 (1984), the trial court erred in not setting the award aside or ordering a remittitur. In *Davis* the

Kentucky Supreme Court explained that the "first blush rule" is a mechanism to assist the trial court in determining whether a jury's award of damages is so excessive as to appear to have been given under the influence of passion or prejudice under CR 59.01(d).

Formerly it was considered in this jurisdiction that punitive damages, in part at least, were "given as compensation to the plaintiff, and not solely as a punishment of the defendant." *Tennessee Central R. Co.* v. *Brasher's Guardian*, 29 Ky. Law Rep. 1277, 97 S.W. 349 (1906); *see also Louisville & N. R. Co.* v. *Ritchel*, 148 Ky. 701, 147 S.W. 411 (1912). The present view is that they are awarded solely to punish the defendant for his outrageous conduct and to discourage similar conduct. *See Ashland Dry Goods Co.* v. *Wages*, 302 Ky. 577, 195 S.W.2d 312 (1946). The change in theory appears to have occurred as the scope of damages that can be recovered by way of compensatory damages has expanded. Still, it should be recognized that punitive damages are not paid to the state treasury but to the injured party, and for that reason do still serve as a practical matter to compensate a successful plaintiff for such things as attorney fees for which he may not be entitled to recover by way of compensatory damages. Perhaps a more forthright rule would acknowledge that recovery for litigation expense is allowable as an element of punitive damages. This would have the virtue of giving the jury a more definite criterion for setting at least a portion of the punitive damage award. But, that is not now the law.

The law in this jurisdiction has long been that the amount of punitive damages to be awarded rests in the sound discretion of the jury with the limitation that the amount awarded cannot be so excessive as to indicate that it was made under the influence of passion or prejudice. Of equal importance, the amount must have some reason-

able relation to the injury and its cause, and not be disproportionate when compared to them. *See Louisville & N. R. Co.* v. *Roth*, 130 Ky. 759, 114 S.W. 264 (1908). However, the award need not bear any proportional relation to the amount of compensatory damages awarded. *See Hensley* v. *Paul Miller Ford, Inc.*, Ky., 508 S.W.2d 759 (1974).

Although it is impossible to measure with absolute certainty the amount of punitive damages, litigants must not be left to a jury's arbitrary will without remedy. *See Louisville So. R. Co.* v. *Minogue*, 90 Ky. 369, 14 S.W. 357 (1890). To permit an arbitrary award to stand would be to disregard Section 2 of Kentucky's Constitution.[1] The verdict is to be treated prima facie as the result of honest judgment on the part of the jury and the reviewing court is to exercise great caution in interfering with that verdict. *Minogue*, 14 S.W. at 358. If, however, the verdict can be accounted for only on the theory that it is the result of an improper sympathy or unreasonable prejudice, "it is one of the highest duties of a court to interfere." *Id.*

The damage award in *Davis* v. *Graviss, supra*, was for compensatory rather than punitive damages; however, in *Fowler* v. *Mantooth*, Ky., 683 S.W.2d 250 (1984), the court applied the holding in *Davis* to review a jury's award of punitive damages. It emphasized that insofar as appellate review of an award is concerned, the trial court's decision on excessiveness is presumptively correct, and the appellate court will reverse that decision only when the trial court has abused its discretion.

Whether the rule in *Mantooth* states a distinction without a difference from that in *Minogue* is not for us to say,

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[1]Unlimited jury or judicial discretion in setting punitive damages would also raise a federal constitutional question. *See Pacific Mutual Life Insurance Co.* v. *Haslip*, U.S. ___, 59 U.S.L.W. 4157, 111 S. Ct. 1032 (March 4, 1991).

but it seems inescapable that to apply either, the appellate court must first determine whether the jury has abused its discretion in awarding punitive damages. How else can it be determined that the trial court has or has not abused its discretion in confirming or setting aside the jury's award?

We well understand the perplexity of the learned trial judge in attempting to apply our law with respect to punitive damages to the question of excessiveness. In doing this he was engaged in a less than exact science, although one not without fixed norms. It is apparent that he was well versed in the law on the subject; nevertheless, his ruling that the punitive damages award was not excessive appears ultimately to have been based upon consideration of the compensatory damages award and reliance upon a recent case in which Kentucky's Supreme Court had held that an award of punitive damages equalling 42 times the amount of the compensatory damage award was not excessive. It might well be in a given case that an award of punitive damages which is 42 times the amount of compensatory damages would be appropriate. It might well be that punitive damages considerably less than the amount of compensatory damages would also be appropriate in a given case. Nevertheless, the amount of compensatory damages simply has no direct relevance to the amount of punitive damages to be awarded in the sense that the punitive damages should be judged as some multiple or fraction of compensatory damages. Punitive damages should be measured by the injury inflicted and its cause, while taking into account the factors set out in KRS 411.186 and the purpose of such damages, which is to punish and deter similar tortious conduct.

The injury inflicted here was substantial. Under the jury's finding the Bank effectively destroyed the Hanson Construction Company as a result of its intentional tort. The evidence raised an inference that the Bank realized what would happen to Hanson, but acted to better its own

financial position through deceit. Further, the Bank did not act to remedy its misconduct. At the same time it should be considered that the injury inflicted was financial as opposed to the infliction of serious physical injuries or the loss of life or creating a danger of either.

The award of compensatory damages was substantial and would seem to have more than slight deterrent effect on future deceptive conduct by the Bank. Comparing the amount of punitive damages assessed with the injury sustained and the fraud which caused it, and taking into account the relevant statutory factors, we believe that the award made by the jury was so disproportionate that the trial court should have interfered. *See Louisville & N. R. Co.* v. *Roth*, 114 S.W. at 266. We do not conclude that the award was the product of passion or prejudice, but rather the result of the lack of a precise measure for fixing the amount to be awarded. The jury was instructed as to when punitive damages may be awarded and the purpose of such damages and the statutory factors to be considered in fixing the award. That is all of the guidance it had in setting an amount and about all that it could have under our system. Reasonable minds free of any passion or prejudice might differ greatly on what is an appropriate award based on the criteria to be considered. This might also be said of an award for pain and suffering. In any event, we still consider the award here to have been out of proportion to the injury and its cause.

The Bank states that under anti-trust and similar statutes there has been established "a benchmark punishment" of treble damages, and by implication it seems to suggest that this might be a standard by which to judge the punitive damages here. We do not think that necessarily follows, although it does constitute an expression of public policy with respect to certain wrongs involving commercial enterprises. We do conclude, however, that to the extent that the award of punitive damages in this case exceeded

an amount which would equal three times the compensatory damages, it was clearly excessive and the amount of excess should be remitted or a new trial ordered.

As to the other questions raised by the Bank, we find no reversible error, and we are not convinced on this record that the verdict was reached by the method condemned in *Louisville & N. R. Co.* v. *Marshall's Adm'x*, 289 Ky. 129, 158 S.W.2d 137 (1942), as constituting reversible error.

With respect to the cross-appeal, we find no abuse of discretion by the trial court in awarding attorney fees to the Bank since the Hansons elected to affirm their contract with the Bank and pursue their tort remedy.

The judgment of the trial court is affirmed with respect to the award of compensatory damages and is reversed as to the award of punitive damages, and this matter is remanded to that court for remittitur of the excess of punitive damages or the grant of a new trial as to those damages.

DYCHE, JUDGE, CONCURS.

HAYES, JUDGE, CONCURS IN PART AND DISSENTS IN PART AND FILES A SEPARATE OPINION.

HAYES, JUDGE, CONCURRING IN PART AND DISSENTING IN PART. I concur with the majority in affirming the trial court and dissent from that part that reverses and remands the issue of punitive damages. I would affirm the entire case. I know of no legal authority that permits a remand and/or remittitur on that issue.

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WARREN CIRCUIT COURT

DIVISION I

Civil Action No. 87-CI-318

HANSON CONSTRUCTION COMPANY, INC.,
H. C. HANSON, VIRGINIA HANSON, and
CONSTRUCTION ENGINEERS, INC. - - - *Plaintiffs,*

v.

AMERICAN NATIONAL BANK & TRUST
COMPANY - - - *Defendant, Counter-Claimant and Third-Party Plaintiff,*

v.

LUCILLE KINSLOW, - - - - *Third-Party Defendant.*

AMENDED TRIAL ORDER AND JUDGMENT

—Entered March 7, 1989

In accordance with the provisions of Rule 59 of the Kentucky Rules of Civil Procedure, the trial order and judgment entered in this action on January 27, 1989, is amended to read as follows:

This case was tried over a period of 24 days commencing on November 22, 1988, and ending on January 25, 1989.

The plaintiff corporations were present by their president, H.C. Hanson, and he and the plaintiff, Virginia Hanson, were present in person. All plaintiffs were represented by Charles D. Greenwell and David J. Kellerman.

The defendant, American National Bank & Trust Company, was present by its president, Robert Aldridge, and was represented by Douglas G. Sharp and Darell R. Pierce.

The third-party defendant, Lucille Kinslow, who was represented by Robert M. Alexander, having no direct interest in the outcome of the trial, was excused from participation in the trial.

The following jury was selected and sworn to try the case:

Brenda Martino	Kathleen Pankey
Roger Crabtree	Sandy Whitney
Judy Martin	Larry LaRue
Troy Tabor	Jack Butler
Orville Phelps	Lawrence White
Norma Harvey	Paula Stanley
Barbara Watt	Jon Tolbert.

Opening Statements were made by Mr. Greenwell for the plaintiffs and Mr. Sharp for the defendant.

The plaintiff called the following witnesses: H. C. Hanson (on 11/22, 23, 28, 29, 30 and 12/1/88), Virginia Hanson (on 12/1/88), Roger Dalton (on 12/1/88), Robert Aldridge (on 12/2/88), Thomas M. Gurbach (on 12/2/88), Robert Farris (by deposition on 12/2/88), Joan Hagan (on 12/7/88), David E. Chestnut (on 12/7/88), Willie Thomas McElroy (on 12/7-8/88), Jim Skaggs (on 12/9/88), Steve Hanson (on 12/9/88), Sandra Perry (on 12/9/88), Lee Anderson (by deposition on 12/9/88), James Scott (by deposition on 12/9/88), Dr. Douglas V. Austin (on 12/12/88), Richard T. Meyer (on 12/13-14/88) and announced closed (on 12/14/88).

The defendant moved for a directed verdict, which was sustained in part and overruled in part as appears of record.

The defendant called the following witnesses: Robert Aldridge (on 12/15/88), Herbert J. Smith (on 12/15/88), Virginia Hanson (by deposition on 12/15/88), H.C. Hanson (by deposition on 12/15-16/88), Deborah W. Williams (on 12/16/88), Larry Hinton (by deposition on 12/16/88), Carol

Sandidge (on 12/16/88), George Shaw (by deposition on 12/16/88) and Joyce Wilson (on 12/16/88), at which point the case was adjourned until January 10, 1989.

On January 10, 1989, the parties and counsel were present as before the recess. Mr. Greenwell, for the plaintiffs, and Mr. Sharp, for the defendant, made interlocutory statements.

The defendant then called the following additional witnesses: Joyce Wilson (on 1/10/89), Margaret Manning (on 1/10-11/89), John W. Saltzman, Jr. (on 1/10/89), Kent Kirby (on 1/11/89), John (Jack) Jenkins (on 1/11-12/89), James Cook (on 1/12/89), Tommy Jackson (by deposition on 1/12/89), Henry Faurest (on 1/12-18/89), Spencer A. Coates (on 1/19-20 and 23/89) and announced closed.

On rebuttal, the plaintiff called Joan Hagan (on 1/23/89) and Charles Cowles (on 1/23/89) and announced closed.

On rebuttal, the defendant recalled Spencer Coates (on 1/23/89) and announced closed.

The defendant moved for a directed verdict on the debt instruments and upon the plaintiffs' claims. The motions were sustained in part and overruled in part as appears of record and as hereinafter set forth.

The plaintiff moved for a directed verdict. The motion was overruled.

The parties having previously tendered proposed instructions, moved the Court to instruct the jury in accordance therewith. To the extent that the tendered instructions are not incorporated into the instructions given by the Court, the motions were overruled.

On January 24, 1989, the Court instructed the jury and closing arguments were made by Mr. Sharp for the defendant and Mr. Greenwell for the plaintiffs.

On January 25, 1989, Kathleen Pankey and Paula Stanley were selected as alternates and excused, and at

10:10 a.m., the jury retired to consider its verdict. Following its deliberations, at 2:15 p.m., the jury returned the following verdict in the form of answers to special interrogatories:

1. Have the plaintiffs established their claim against the defendant for fraudulent misrepresentation by clear and convincing evidence?

ANSWER: "Yes"

• • • • • • • •

2. Are you satisfied from the evidence that the defendant violated its duty to deal in good faith with the plaintiffs in the performance and enforcement of the loan agreements?

ANSWER: "Yes"

• • • • • • • •

3. Are you satisfied from the evidence that the plaintiffs violated their duty to deal in good faith with the defendant in the performance of the loan agreements?

ANSWER: "No"

• • • • • • • •

4. What sum do you find from the evidence will fairly and reasonably compensate the plaintiff, H.C. Hanson Construction Company, Inc., for the fair market value of the corporation on March 23, 1987?

ANSWER: "$1,065,000.00."

• • • • • • • •

5. What sum do you find from clear and convincing evidence should be awarded the plaintiffs as punitive damages?

ANSWER: "$5,775,000.00."

/s/ Roger D. Crabtree
Foreman

/s/	Roger D. Crabtree	/s/	J. Todd Tolbert
/s/	Jack Butler	/s/	Lawrence White
/s/	Sandy Whitney	/s/	Larry LaRue
/s/	Barbara Watt	/s/	Troy Tabor
/s/	Orville Phelps		
/s/	Norma F. Harvey		

At the request of the defendant, the jury was polled and when questioned, each juror who had signed the verdict indicated that it was his or her verdict as to each of the interrogatories answered.

In accordance with the verdict of the jury and the rulings of the Court made during the trial of this action, it is ORDERED and ADJUDGED as follows:

1. The plaintiff, H.C. Hanson Construction Company, Inc., shall recover from the defendant, American National Bank & Trust Company, the sum of $6,840,000.00, together with interest at 12% per annum, compounded annually, from and after entry of this judgment, until paid, less the sums awarded in paragraphs 2, 3, 4 and 5 below, and the costs of this action.

2. The defendant, American National Bank, shall recover from the plaintiffs, jointly and severally, the sum of $124,151.17, representing the principal balance of the February 17, 1984, note, the further sum of $25,139.17, representing interest on said note through December 13, 1988, and the interest on the principal balance at the rate of 10.5%, compounded annually, from and after December 14, 1988, until January 27, 1989.

3. The defendant, American National Bank, shall recover from the plaintiffs, jointly and severally, the sum of $364,929.44, representing the principal balance of the July 26, 1985, note, the further sum of $91,990.37, representing interest on said note through December 13, 1988, and interest on the principal balance at the rate of 11%, compounded annually, from and after December 14, 1988, until January 27, 1989.

4. The defendant, American National B. k, shall recover from the plaintiffs, jointly and severally, the sum of $67,048.09, representing the principal balance of the June 6, 1986, note, the further sum of $12,906.91, representing interest on said note through December 13, 1988, and interest on the principal balance at the rate of 10.5%, compounded annually, from and after December 14, 1988, until January 27, 1989.

5. The defendant, American National Bank, shall recover from the plaintiffs the sum of $101,385.00, which the Court has determined to be a reasonable attorney's fee for services rendered in collecting the notes referred to in paragraphs 2, 3 and 4 above.

6. The plaintiffs shall maintain in full force and effect, pending a final resolution of this action, a policy or policies of insurance issued by a company authorized to do business in the Commonwealth of Kentucky, insuring buildings located on the premises subject to the mortgages granted to the defendant against damage or destruction by fire, windstorm or other casualty, in an amount equal to the fair cash value of such buildings with the defendant named in said policies as an additional insured. The defendant shall be furnished with proof that said policy or policies of insurance have been issued and are in effect.

This 6th day of March, 1989.

/s/ Joseph R. Huddleston
Joseph R. Huddleston, Judge
Warren Circuit Court, Division I

Clerk, send copies to:
Charles D. Greenwell
David J. Kellerman
Douglas G. Sharp
Darell R. Pierce
Stephen L. Hixson
Robert M. Alexander

BEST AVAILABLE COPY